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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 761.

THE STATE OF TENNESSEE, FOR USE OF THE CITY OF MEMPHIS, AND THE CITY OF MEMPHIS,
APPELLANTS,

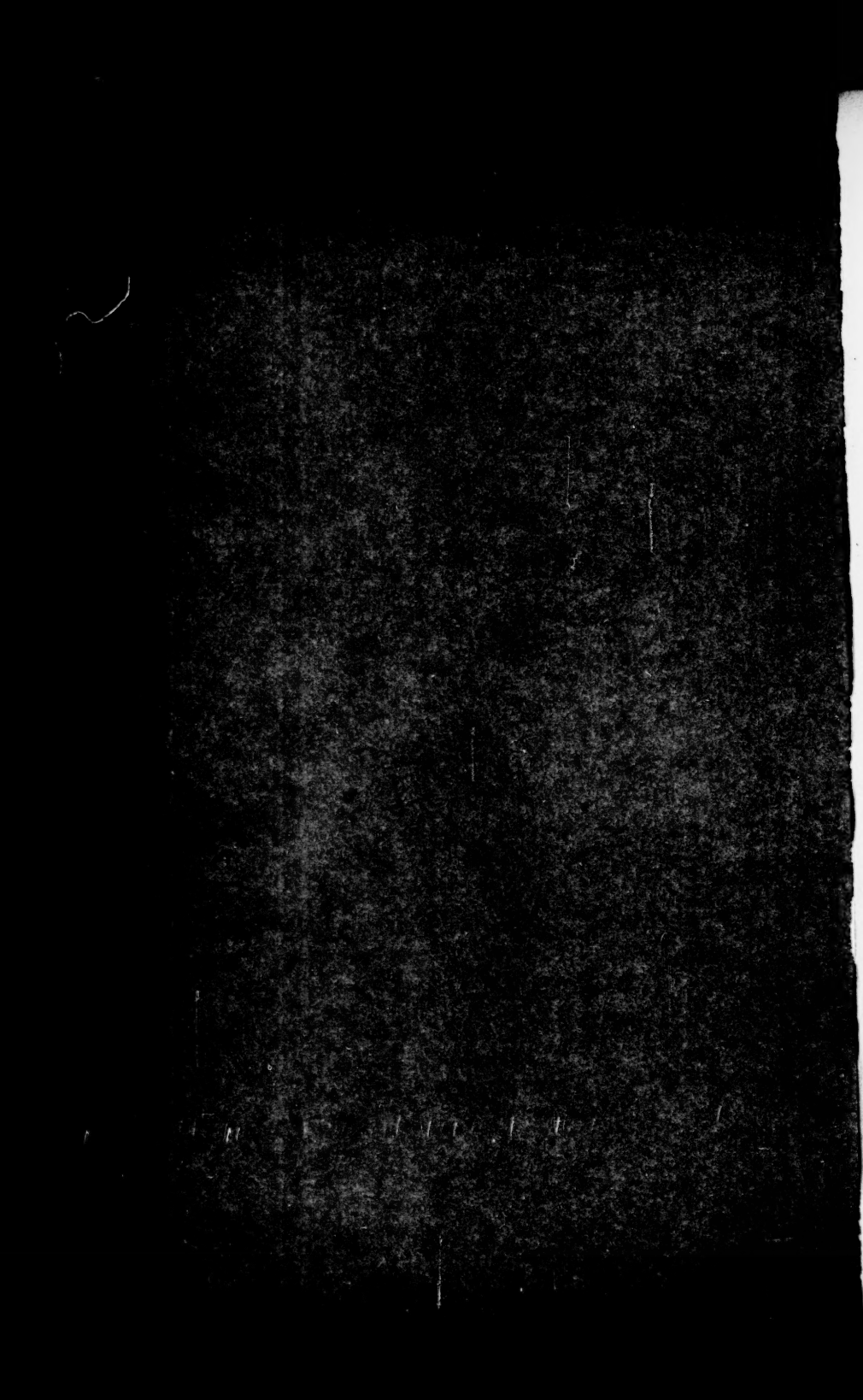
vs.

THE BANK OF COMMERCE AND J. A. OMBERG.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

FILED JUNE 21, 1892.

(15,060.)



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1 Circuit Court of the United States, Western District of Tennessee.

STATE OF TENNESSEE, for Use of City of Memphis, — THE CITY OF MEMPHIS
versus
THE BANK OF COMMERCE and J. A. OMBERG. } No. 438.

Metcalf & Walker, for plaintiffs.
F. T. Edmondson, " "
Taylor & Carroll, for defendants.

Transcript to Supreme Court on Appeal.

2 Circuit Court of the United States, Western District of Tennessee.

STATE OF TENNESSEE, for Use of The City of Memphis,
vs.
BANK OF COMMERCE and J. A. OMBERG. } No. 438.

Transcript from the chan. c't of Shelby Co., Tenn. Filed in U. S. cir. c't for W. D. T., Nov'r 17th, 1891.

Chancery Court of Shelby County.

STATE OF TENNESSEE,
Shelby County.

Be it remembered that at a term of the chancery court of Shelby county, State aforesaid, began and held at the court-house, in the city of Memphis, in and for said county, on Monday, the — day of ——, 18—, the same being the first Monday in ——, 188— —present and presiding, the Hon. B. M. Estes, chancellor of said court—the following proceedings were had, to wit:

Original Bill. Filed October 22d, 1891.

STATE OF TENNESSEE, for the Use of the City of Memphis, and THE CITY OF MEMPHIS
vs.
THE BANK OF COMMERCE and J. A. OMBERG.

3 To the Honorable W. D. Beard, chancellor of the chancery court of Shelby county, Tennessee:

Complainants respectfully state and show unto your honor as follows, to wit:

I. By an act of the legislature passed February 29th, 1856, Benjamin Chandler and his associates were created a body politic and corporate under the name of the Chattanooga Savings Institution, with the usual powers of a banking company, the business of said company being located under the charter at the city of Chattanooga,

in Tennessee. By subsequent acts of the legislature of the State said institution was authorized to remove its situs to the city of Memphis, Tennessee, and its name was first changed to the Savings Bank of Memphis and afterwards to the Bank of Commerce, the last change in the name being made by an act passed March 12th, 1873.

II. Complainants are advised that, under certain litigation heretofore arising between the State and said bank, the supreme
4 court of the State, in a case entitled State *vs.* Butler and reported in 2d Pickle, 614, determined that the bank was in all respects organized under and had all the powers, privileges, and immunities expressed in the charter of said Chattanooga Savings Institution. By the 3d section of said charter it was enacted that said company should "pay to the State an annual tax of one-half of one per cent. on each share of capital stock, which shall be in lieu of all other taxes." The capital stock of said defendant bank is $1,000,000.00.

III. For the year 1891 the capital stock of said Bank of Commerce was assessed at the sum of $466,500. The State of Tennessee for that year levied a total tax rate of $1.75 on every $100 of property in the city of Memphis for the use of said city, and the said defendant corporation, upon the theory that the shares of stock therein are exempt, it is therefore indebted to the State for the use of said city or to said city directly in the sum of $8,163.75,
5 the unpaid tax on the capital stock aforesaid for said year 1891, and the sum last aforesaid bears interest at the rate of six per cent. annually from the first day of May, 1891. For the year 1887 the capital stock of the defendant company was duly assessed, both by the regular assessing officer and by the county trustee, at the sum of $342,000.00. The municipal tax rate for that year was $2.35, and the amount due from the defendant bank, upon the theory that the shares of stock are exempt from taxation, is the sum of $8,037.00, with interest from May 1st, 1891.

By section 14 of the general revenue law of the State, passed in 1887, the same being chapter 2 of the acts of that year, it was enacted as follows, to wit: "Be it further enacted, that this act shall not be so construed and shall not so operate as to exonerate or release from taxation any company or corporation who- charter exempts stock and shares thereof from taxation; but it is
6 hereby enacted that in all cases where such stock — exempted such company or corporation shall be assessed in such way as may be lawful; and in cases in which, by the terms or legal effect of the charter, the shares of stock in any corporation are wholly or partially exempt from taxation or in which a rate of taxation on the shares of stock is fixed and prescribed and declared to be in lieu of all other taxes, taxes for State, county, and municipal purposes shall be levied and assessed at a rate uniform with the rate levied upon other taxable property, upon the capital stock of said corporation, the value of which capital stock shall be fixed and returned by the assessor as being equal to the aggregate market value of all the shares of stock in said corporation, including the

net surplus;" but notwithstanding the provisions of said section, the capital stock of said corporation was not assessed by the regular assessing officer for the years 1888, 1889, or 1890. Ascertaining this fact, the county trustee, as he was authorized to do, has
7 duly assessed said capital stock for the years aforesaid as follows, to wit:

For the year	1888	$342,000
" " "	1889	399,000
" " "	1890	530,000

For the year 1888 the city tax ad valorem was $2.35 on the $100; for the years 1889 and 1890 the ad valorem tax in and for said city levied by the State was $2.35 on the $100, so that said defendant corporation, for the years aforesaid, upon the theory that the shares of stock are exempt, is indebted to complainant City of Memphis or to the State for its use in the sums following, to wit:

For the year	1888	8,037 00
" " "	1889	9,376 00
" " "	1890	12,455 00

Each of the several amounts aforesaid bears interest from the first day of May of the year for which the tax was levied.

V. The defendant corporation claims that by virtue of its original charter and amendments thereto its capital stock is exempt from taxation. Said capital stock is assessable and taxable under
8 section 14 aforesaid of chapter 2 of the Acts of 1887, the said section having been continuously in force since said enactment to the present time. For the year 1872 the State, county of Shelby, and city of Memphis, under the legislation of the State then in force, undertook to assess and tax as other property was assessed and taxed for that year the shares of stock in the hands of the stockholders of said company, its corporate name then being the Savings Bank of Memphis. This effort to tax said shares of stock was resisted by said shareholders; litigation ensued in the second chancery court of Shelby county, Tennessee. The controversy in that court determined in favor of the stockholders and against the power of the State, county, or city to tax the shares of stock.

An appeal therefrom was taken to the supreme court of the State, in which court the decree of said chancery court was reversed and a decree rendered in favor of the power to tax said stock,
9 from which last decree a writ of error was sued out from the Supreme Court of the United States, and at the hearing in that court the decree of the supreme court of Tennessee was reversed, the case remanded to that court with direction to enter a decree affirming the decree of the second chancery court of Shelby county and negating the power to tax said shares of stock in the hands of the stockholders. Complainants are advised that the capital stock in the hands of the corporation and the shares of stock in the hands of the stockholders are separate and distinct subjects of taxation; that in the absence of any exemption clause it was within the power of the State, without subjecting such legislation to the objection of

double taxation, to have taxed both the capital stock of the corporation and the shares of stock in the hands of the stockholders; that the charter tax, bonus, or whatever else it may be called of one-half of one per cent. to be paid to the State is a tax upon
10 the shares of stock, and that the language "in lieu of all other taxes" means in lieu of all other taxes on the shares of stock. It has no effect, as complainant is advised and charges, to exempt the capital stock of the corporation from taxation.

VI. Complainants are advised that under the provisions of the acts of 1887 aforesaid, which act, so far — is material to the questions here involved, has been continuously re-enacted by the legislature of the State, the capital stock of said corporation or the shares of stock in the hands of the stockholders therein is or are taxable. They are further advised that the immunity and exemption embraced or claimed to be embraced in the charter of said defendant corporation cannot operate to exempt both the shares of stock and the capital stock in the hands of the corporation from taxation. Being advised and believing that both the corporation and its capital stock and the holders of the shares of stock could not successfully claim exemption from taxation, the assessing officer- of
11 the State have from year to year since and including the year 1887 demanded of the proper officers of said corporation a list of the names of the persons owning shares of stock therein on the 10th day of January of each year, but the said corporation, by its officers claiming that the shares of stock were not subject to taxation, have refused to furnish the names of the shareholders in said corporation when demanded as aforesaid. The said officer accordingly for the years 1889 and 1890 assessed the shares of stock in the following form, to wit: For the year 1889—

"Bank of Commerce:"

"Unknown owners of shares of stock, 6,000 shares;" "valuation, $399,000."

And for the year 1890, thus:

"Unknown owners of 6,000 shares of stock of Bank of Commerce, valuation, $530,000." Complainants are not informed who are the owners of said shares of stock. They are informed that it is claimed in their behalf by the officers of the bank representing them that the said shares of stock are not taxable, and
12 that even if taxable the assessment is void for indefiniteness and uncertainty. To the end that complainants may fairly and properly test the question as to whether by the legal effect of the charter of the defendant corporation both the shares of stock in the hands of the stockholders and the capital stock in the hands of the bank are exempt from taxation, J. A. Omberg, cashier of said bank and the custodian of its books now and for many years heretofore, including the year 1887, is made a defendant hereto, and is required in his answer to state under oath from the books of said defendant corporation the names of all persons or corporations owning shares of stock in said bank on the 10th day of January of each and every year since and including the year 1887. It is the purpose of the complainant when the names of such shareholders

shall be furnished in the manner aforesaid to have said shares of stock assessed for each of the years aforesaid so far as the same has not been already legally done and to bring the shareholders before the court in this proceeding by such amended and supplemental pleadings as may be necessary. Complainants do not claim that both the shares of stock in the hands of the shareholders and the capital stock in the hands of the corporation were undertaken to be taxed by the legislature of the State, but they do claim that for and since the year 1887 the revenue laws of the State provided generally that the corporate property in the hands of a corporation should not be taxed, but that the shares of stock should be assessed and taxed at their market value. It is further provided by the said act of 1887 and by the succeeding biennial session of the legislature of the State, as appears by the quotation hereinbefore made of section 14 of the Act of 1887, that the capital stock in the hands of the corporation should be taxed if by the charter provisions the shares of stock were not subject to taxation, wherefore complainants desire that both the corporation and the shareholders may be brought before the court in one proceeding, and that it may be determined whether the tax is validly laid on the shares of stock in the hands of stockholders or on the capital stock in the hands of the corporation.

VII. Complainants are informed and charged that since the adoption by the State of Tennessee of the constitution of 1870 the defendant banking company has increased its capital stock from $60,000 to $1,000,000. The bank, however, claims that its increase has been from $200,000. It is advised that the new stock, whatever may be the amount thereof, is taxable. It asks that the defendant J. A. Omberg may on his oath state in his answer whether or not the capital stock of the defendant banking company has been increased since the adoption by the State of the constitution of 1870, to wit, since the 4th day of May, 1870, and that he further on oath state the date or dates of such increase of stock, if it has been increased more than once since the date last aforesaid, and that from the books of said company he may furnish a list of the persons, firms, or corporations owning shares of stock on the 10th day of January of each year since and including the year 1887 that have been issued since the adoption of the constitution of the State on the 4th day of May, 1870. This discovery on oath is asked to the end that the shares of stock may be assessed, and the owners thereof may by appropriate amended and supplemental pleadings be brought before the court in this cause for the purpose of enforcing and collecting the tax due therefrom. Complainants do not concede, but on the contrary deny, that the aforesaid assessment of the shares of stock for the years 1889 and 1890 are void and invalid, and when the names of the stockholders shall have been discovered and they shall have been brought before the court the amount of tax due from each of them under said assessment will be shown and judgment prayed for against them.

VIII. By an act of the legislature passed March 19th, 1889, and

approved March 23d, 1889, the same being chapter 104 of the Acts of 1869, a privilege tax on banking within and for the city of Memphis, then the taxing district of Shelby county, was levied in terms following, to wit: "On the privilege of banking, $1 on every $1,000 of paid-in capital stock, but in no case less than $50 annually." Complainants state that the amount of capital stock of the defendant banking company since and during the year 1889 has been $1,000,000, and that under the enactment aforesaid the said defendant banking company is indebted to the State for the use of the city of Memphis or to said city directly in the sum of $100 annually, payable at the date of the passage of the act
17 last aforesaid for the year 1889 and on the first day of January for the years 1890 and 1891. Premises considered, complainants pray that the parties named as such in the caption be made defendants hereto; that copy and subpœna issue returnable to the next December rule day of the court; that the defendant corporation answer under its corporate seal; that the other defendant answer under oath the specific matters as asked in the body of the bill; that the court may determine whether the corporation or the shareholders therein have any immunity from taxation under the charter of said company; that complainants may have a decree against the defendant corporation for such taxes, with proper interest, as may be legally due from it, and may have such further and general relief as in equity it ought to have under the facts stated.

F. T. EDMONDSON,
METCALF & WALKER,
Sol's for Complainant-.

18 *Cost Bond.*

We, City of Memphis, as principal, and —— ——, as surety, acknowledge ourselves indebted to Bank of Commerce & *al.* in the sum of two hundred and fifty dollars, to be void if the said City of Memphis, complainant in a bill which has this day been filed in the chancery court of Shelby county against the said Bank of Commerce & *all.* shall pay all costs as may be awarded against it by the court in its decrees and orders in said cause. This 22d day of October, A. D. 1891.

S. P. WALKER.
F. T. EDMONDSON.
C. W. METCALF.

Spa. to Answer. Iss'd October 24th, 1891.

The State of Tennessee to the sheriff of Shelby county:

Summon the Bank of Commerce and J. A. Omberg, if to be found in your county, to appear before the chancery court of Shelby county, at the court-house, in Memphis, Tennessee, on the first

Monday in December next, then and there to answer the bill
19 of complaint of the State of Tennessee, for the use of the city of Memphis, a copy of which accompanies this writ; herein fail not and have you then and there this writ.

Witness E. B. McHenry, clerk and master of said court, at office, in Memphis, this first Monday in October, 1891.

E. B. McHENRY, *C. & M.*,
By T. B. CALDWELL, *D. C. & M.*

Endorsed: Issued October 24, 1891.

Came to hand October 24th, 1891, and executed on the Bank of Commerce by reading this writ to J. A. Omberg, its cashier, and on J. A. Omberg individually; left with him copy of bill.

A. J. McLENDON, *Sheriff*,
By G. W. BLACKWELL, *D. S.*

Petition of Defendants for Removal. Filed November 7th, 1891.

Your petitioner, The Bank of Commerce, respectfully shows and states that it is one of the defendants to the above-entitled cause; that it was at the time of the institution of this suit and now is a citizen of the State of Tennessee, being a corporation created
20 by the special act of the General Assembly passed on the 29th of February, 1856; that the matter and amount in dispute between it and the city of Memphis in the said suit exceeds, exclusive of interest and costs, the sum or value of $2,000. The said suit is of a civil nature, arising under the Constitution of the United States, in this: The complainant, The City of Memphis, claims the right to collect from your petitioner municipal taxes upon its capital stock under the general laws of the State, being chapter 2 of the Session Acts of 1887, and particularly under the 14th section of that act, which provides as follows: "Be it further enacted, That this act shall not be so construed and shall not so operate as to exonerate or release from taxation any company or corporation whose charter exempts stock and shares thereof from taxation; but it is hereby enacted that in all cases where such stock is exempted
21 such company or corporation shall be assessed in such way as may be lawful; and in all cases in which by the terms or legal effect of the charter the shares of stock in any corporation are wholly or partially exempt from taxation or in which a rate of taxation on the shares of stock is fixed and prescribed and declared to be in lieu of all other taxes, taxes for State, county, and municipal purposes shall be assessed and levied at a rate uniform with the rate levied upon other taxable property upon the capital stock of said corporation, the value of which capital stock shall be fixed and returned by the assessor as being equal to the aggregate market value of all the shares of stock in said corporation, including the net surplus;" and also to collect privilege taxes from your petitioner under an act of the legislature passed the 19th of March, 1890, being chapter 104 of the Session Acts of that year, while your peti-

tioner claims that inasmuch as the State granted to it a
22 charter and by the 3d section of the said charter enacted that it should pay to the State an annual tax of one-half of one per cent. on each share of capital stock, which shall be in lieu of all other taxes, that the aforementioned acts of the said assembly of Tennessee are repugnant to that provision of the Constitution of the United States contained in section 10 of article 1 that ordains that no State shall pass any law impairing the obligation of a contract.

And your petitioner further shows that this particular controversy in the aforementioned suit is a distinct and separable controversy, the decision of which necessarily involves the judgment of the court as to whether this petitioner is entitled to the constitutional protection to its contract set forth in the bill of complaint and in this petition; and your petitioner herewith tenders a bond, with good and sufficient surety, for its entering in the said court on the first day of its next session a copy of the record in this suit and
23 for paying all costs that may be awarded against it if the said circuit court shall hold that this suit was wrongfully or improperly removed thereto, and it prays this court to proceed no further herein, to accept said surety and bond, and cause the record to be removed into the aforesaid circuit court of the United States for the western district of Tennessee, at Memphis.

THE BANK OF COMMERCE,
By TAYLOR & CARROLL.

Bond.

Know all men by these presents that the Bank of Commerce, as principal, and William H. Carroll, as surety, are held and firmly bound unto the State of Tennessee, for the use, etc., in the penal sum of five hundred dollars; for the payment whereof, well and truly to be made unto the said State of Tennessee, for the use, etc., its heirs and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents, yet
24 upon these conditions: The said Bank of Commerce having petitioned the chancery court of Shelby county, State of Tennessee, for the removal of a certain cause therein pending, wherein The State of Tennessee and The City of Memphis are the plaintiffs and The Bank of Commerce and J. A. Omberg are defendants, to the circuit court of the United States in and for the western district of Tennessee: Now, if said Bank of Commerce, your petitioner, shall enter in the said circuit court of the United States, on the first day of its next session, a copy of the record in said suit and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this 5th day of November, 1891.

BANK OF COMMERCE.
[SEAL.] J. A. OMBERG, *Cashier.*
WILLIAM H. CARROLL, *S'ty.*

25 *Order for Removal. Entered November 6th*, 1891.

In this cause, the Hon. W. D. Beard, chancellor, being of counsel and incompetent, the Hon. Jacob S. Galloway, judge of the probate court of Shelby county, Tennessee, sitting in the place of the chancellor, heard the application of the Bank of Commerce for removal, and, having read the petition and bond and they appearing to be regular, he is pleased to order that all further pleadings herein be stayed and the clerk and master of this court make out and certify a full and perfect transcript herein. To the foregoing order staying the proceedings in this court and ordering the making out and certifying the transcript the complainants excepted.

J. S. GALLOWAY, *Judge.*

Clerk's Certificate.

STATE OF TENNESSEE, *Shelby County,* } *ss:*

26 I, E. B. McHenry, clerk and master of the chancery court of Shelby county, do hereby certify that the foregoing 30 pages contain a full, true, and perfect transcript of all the proceedings had in a certain cause lately pending herein, wherein The State of Tennessee, for the use of the city of Memphis, &c., is complainant and The Bank of Commerce *et al.* are defendants, as the same appears of record and on file in my office.

In witness whereof I hereunto set my hand and affix the seal of said court, at office, in Memphis, this 12th day of November, A. D. 1891.

E. B. McHENRY,
Clerk and Master,
[SEAL.] By T. B. CALDWELL, *D. C. & M.*

27 UNITED STATES OF AMERICA, *Western Division of the Western District of Tennessee.* }

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof begun and held for its May term, A. D. 1891, at the United States courthouse, in the city of Memphis, in said district, on, to wit, the 17th day of November, A. D. 1891, in the following cause, to wit:

THE STATE OF TENNESSEE, for the Use, etc., Plaintiff,
vs.
THE BANK OF COMMERCE and J. A. OMBERG, Defendant. } No. 438.

This day came the defendants, by their attorneys, and file herein a transcript on the removal of this cause to this court from the chancery court of Shelby county, Tennessee, and the same is or-

dered to be filed and the cause docketed according to the practice of the court.

[Endorsed:] No. 438. Circuit court of the United States, western district of Tennessee. State of Tennessee, for use, etc., *vs.* Bank of Commerce and J. A. Omberg. Order of court. Entered and filed 17th day of Nov., A. D. 1891. John B. Clough, clerk, by —— ——, deputy.

28 *Demurrer of the Bank of Commerce. Filed Nov. 17th,* 1891.

Circuit Court of the United States, Western District of Tennessee.

STATE OF TENNESSEE, for the Use of the City of Memphis,
vs.
THE BANK OF COMMERCE and J. A. OMBERG. } No. 438.

This respondent assigns as cause of demurrer to the bill of complaint that the 14th section of chapter 2 of the Session Acts of the Tennessee General Assembly of 1887 and the act passed on the 19th of March, 1889, being chapter 4 of the Session Acts of that year, are in conflict with section 10, article 1, of the Constitution of the United States, which ordains that no State shall pass any law impairing the obligations of contracts, and are void. Wherefore this respondent demurs and prays the judgment of the court.

TAYLOR & CARROLL,
Sol's for Respondent.

29 UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee.

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof begun and held for its May term, A. D. 1891, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 20th day of November, A. D. 1891, in the following cause, to wit:

STATE OF TENNESSEE, for the Use, etc., *et al.*, Plaintiff-,
vs.
THE BANK OF COMMERCE *et al.*, Defendant-. } No. 438.

This day came the parties to this cause, by their respective solicitors of record, when the same came on to be heard upon the demurrer of the defendants to the complainants' bill herein, and, there not being sufficient time to complete the argument thereof to-day, its further consideration is hereby postponed until to-morrow.

[Endorsed:] No. 438. Circuit court of the United States, Western District of Tennessee. State of Tennessee, for use, etc., *et al.*, *vs.* Bank of Commerce *et al.* Order of court. Entered and filed 20th day of Nov'r, A. D. 1891. John B. Clough, clerk, by —— ——, deputy.

30 UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee.

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof begun and held for its May term, A. D. 1891, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 21 day of November, A. D. 1891, in the following cause, to wit:

STATE OF TENNESSEE, for Use, etc., *et al.*, Plaintiff-,
vs.
BANK OF COMMERCE *et al.*, Defendant-. } No. 438.

Came again this day the parties to this cause, by their respective attorneys, when the same came on for further argument upon the defendants' demurrer to the bill in this cause, and the argument thereon was completed, but the court, wishing further time for the consideration thereof, takes the cause under advisement therefor and the cause is continued to next term.

[Endorsed:] No. 438. Circuit court of the United States, western district of Tennessee. State of Tennessee, for use, etc., *et al. vs.* Bank of Commerce *et al.* Order of court. Entered and filed 21st day of Nov'r, A. D. 1891. John B. Clough, clerk, by —— ——, deputy.

31 UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee.

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof begun and held for its November term, A. D. 1891, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 31st day of March, A. D. 1892, in the following cause, to wit:

STATE OF TENNESSEE, for Use, etc., *et al.*, Plaintiff-,
vs.
THE BANK OF COMMERCE *et al.*, Defendant-. } No. 438.

Came again the parties to this cause, by their respective solicitors of record, when the same came on for decree upon the demurrer of the defendants to the plaintiffs' bill herein, the same having been argued before the court previously and by the court taken under advisement for consideration, and the same having been considered by the court, it is now hereby ordered, adjudged, and decreed by
32 the court that the said demurrer be, and it is hereby, sustained, and that this cause be, and it is hereby, dismissed. It is therefore considered by the court that the defendants

herein have and recover of and from the plaintiffs in this cause and of the surety on their cost bond herein the costs of the same, for which execution may issue as at law.

[Endorsed:] No. 438. Circuit court of the United States, western district of Tennessee. State of Tennessee, for use, etc., *et al. vs.* Bank of Commerce *et al.* Order of court. Entered and filed 31st day of March, A. D. 1892. John B. Clough, clerk, by —— ——, deputy.

33 *The Bank of Commerce Case.*

United States Circuit Court, W. D. Tennessee, March, 1892.

STATE OF TENNESSEE *et al.*
vs.
BANK OF COMMERCE *et al.* } In Equity.

HAMMOND, *J.:*

The charter of the defendant bank contains this clause: Said institution shall have a lien on the stock for debts due it by the stockholders before and in preference to other creditors, except the State for taxes, and shall pay to the State an annual tax of one-half of 1 per cent. on each share of capital stock, which shall be in lieu of all other taxes." This bill is filed to collect taxes for the years 1887 to 1891, inclusive, amounting in the aggregate to $46,068.75. The taxes are assessed under acts of the legislature which provide among other things, as follows: "And in cases in which, by the terms or legal effect of the charter, the shares of stock in any corporation are wholly or partially exempt from taxation or in which a rate of taxation on the shares of stock is fixed and prescribed and declared to be in lieu of all other taxes, taxes for State, county and municipal purposes shall be assessed and levied at a rate uniform with the rate levied upon other taxable property upon the capital stock of said corporation, the value of which capital stock shall be fixed and returned by the assessor as being equal to the aggregate market value of all the shares of stock in said corporation, including the net surplus."

The bill sets out historically the legislation concerning the taxation of the bank, previous attempts to collect taxes thereunder, certain litigation arising concerning those attempts and generally so states the facts that by the demurrer which the defendant has filed the question is presented whether or not the assessment sought to be enforced is valid in relation to the claim made by the bank that the legislation violates the obligation of the charter contract, and is void under the Constitution of the United States. A Federal question being thus at issue the case is removed to this court from the State chancery court, wherein the bill was originally filed.

Apart from any embarrassments arising out of the adjudications that have concerned this charter, and others precisely like it, in respect of the subject of taxation, I conceive that the ordinary use of the phrase, "in lieu of all other taxes," as distinguished from any

technicalities whatsoever, always imports that none other than the tax specified, however described, can be demanded. Nor, so apart, should I conceive that it was at all material by what designation the sum to be paid "in lieu" of other sums might be called, whether a tax, a bonus, a price paid for the privilege or a debt or obligation of any designation whatsoever; nor whether the sum, however called, should be absolutely fixed, should be ascertainable by some self-adjusting standard or some scheme or method so devised that the amount could be readily known; nor whether the second party to the contract should have the sum to pay, individually or in some aggregate capacity, or that it should be paid by some one else or in some other way designated in the contract. If this were an ordinary contract between individuals all these varying conditions would be absolutely open to any arrangement the parties might choose to make. So they were to the State of Tennessee and Samuel R. McCamy, James Whitesides, John L. M French, Edwin Marsh and James C. Warner, "their associates and successors," when they set about the business of constructing "an institution" which has developed into the "Bank of Commerce." It is altogether true that in and about that business, and in drawing up the "contract" in the form of a "charter" to manifest the agreement of the parties, the State will not be presumed to have curtailed its powers of taxation further than the words of the instrument shall plainly express, or by necessary implication shall be plainly indicated, but otherwise all the conditions above suggested were open to those parties, absolutely. The same rule of plain expression or necessary implication applies in the construction of all contracts, not more to charters than to others, except that the courts, perhaps, are more careful in dealing with such cases than others for obvious reasons of public benefit, though in strictness the courts should not less carefully deal with any contract whatever.

It is an exaggeration of this carefulness, however, to suppose that the words of a contract about the taxation of a bank are to be differently construed than the same words about any other subject to which they would fitly apply, merely because they are applied to a matter of taxation of a bank. The same carefulness of construction about any other subject would produce the same result. If, for example, these citizens had made a contract with the State to build the capitol, and it had been provided that they should pay to the State from time to time a tax of one-half of 1 per cent. on each installment of the money paid out by them for the work, "which shall be in lieu of all other taxes," could it be said that these words would receive any other construction than they do when they are applied to a bank? Or that, because the power of the State was supreme in the premises, and it might, in addition to this tax, have levied a tax upon these citizens individually, each for himself, or upon the whole in the aggregate, a further sum for the privilege *or* having had the contract awarded to them, or a further tax upon the property used in the construction of the capitol—so much for the stone, so much for the iron, and so on, if you please—can it be that these circumstances would change, in any respect, the meaning of the words?

A habit of doing business in this regard by the State, and of levying the tax in a particular manner, would aid a court in arriving at the meaning of the contract undoubtedly, but after all, the words would stand out as expressing that intention to have been just what they import to a fair intelligence, unobscured by any subtleties of meaning developed to accomplish a particular purpose of evading their force and mitigating the unpleasant or undesirable results of their use. It were better that the courts should boldly overrule the decisions which have shackled the sovereign power of the State over taxation than the resort to mere subtleties of construction that shall break down the plain meaning of plain words to the plain people who invest their money upon the understanding that plain people have of such words.

Another fact to be remembered while reading this statutory contract is that it is not a revenue law; it is not a statute concerned with the exercise of a taxing power, except incidentally, as it were. The power of the State in the matter of selecting the subjects of taxation, and in dividing and subdividing those subjects at pleasure, is quite absolute, whether in relation to banks or other corporations and their corporate property, or to the property of citizens. Naturally corporate property, by its very character, suggests a somewhat uniform classification or subdivision for taxing purposes, but, as will be presently shown, there is no fixed or always uniform classification from which so much can be implied as has been urged in argument here. Ordinarily we say that there is, first, the franchise; second, the capital stock; third, the shares of stock, which, in the strictest sense, however, are not corporate property at all, but the property of the individual holder, unless there be confusion in the use of the term; and fourth, the other property not included in any of the other three. But this natural and convenient subdivision is not always adhered to, and is often still further subdivided, and might be subject to almost innumerable subdivisions, just as other property may be. Even the franchise might be separated into different subjects of taxation by taxing each that is granted separately; the capital stock in the very beginning might be subdivided into gold and silver money and legal-tender paper money, if there be such paid in; afterward into bonds, bills receivable, mortgages, exchange, etc., etc.; then profits, or income, or surplus might be separately taxed, and often is; and the ordinary subdivisions of real and personal property might be carried on as they often are in revenue laws, almost *ad infinitum*.

But, as before remarked, this is not a revenue law engaged with such subdivisions, and it seems to me rather too much stress has been laid upon the separable subjects of taxation in relation to corporate property as an element in the construction of this charter. It is true that the cases look to it very closely, and it has been seized upon as a very convenient pathway out of the difficulty of maintaining restrictions upon the sovereign power of taxation
34 which seem disastrous to that power. Yet I do not think the cases have broken down the ordinary rules of statutory construction, and established a special rule, based upon these arbi-

trary subdivisions, to be applied to corporate charters for the purpose of saving the State from the improvidence of those who have fettered this power. The rule of strict construction has been established beyond question, but the cardinal rule remains that the intention of the parties must be fairly ascertained and it has not been established that an unfair advantage shall be given one of them because it is a State, has not made a wise bargain and has granted that which should have been withheld. The strictest adherence to the cases does not require of the court anything more than a rigid observance of the rule that the State shall not, by anything short of express words or necessary implication, be held to have surrendered one iota of its taxing power. But it is a perversion of this principle to hold that if by any possible narrowness of construction, any subtlety of reasoning or any nicety of verbal interpretation the taxing power may be saved, the court shall save it at the sacrifice of the other parties to the contract, who have put their money on the faith of the State to stand by that which it has fairly granted in the way of exemption from taxation.

Another consideration before we take up the language of the act is pertinent here. Next to this rule of strict construction the State insists upon treating this charter tax as one strictly levied upon the shares of stock in the hands of the individual shareholders, and consequently claims that the exemption is one belonging to the shareholder alone, applicable only to him and his property interest and not at all to the bank. But if it be granted that the tax is of that precise nature, does the conclusion follow necessarily, in logical consequence? Concede that a tax upon the shareholder is not a tax upon the bank, directly or indirectly, and grant this premise also, and does the conclusion follow, inevitably, that an exemption of the bank and its property may not be granted to these shareholders in consideration of a charter tax upon them and their property? Why may not the legislature, with all conditions open to it, as they were, exempt the bank from all taxation in consideration that the shareholders shall pay a tax, fixed, no matter how, by agreement between them, either upon their shares in that bank or any other property the shareholder might own? Why could not they agree that such an exemption should be granted to the bank if each stockholder should pay his share of the tax and secure it by a lien, say upon his land, for an example? Or why might the tax not be fixed at so much per acre of the land held by each shareholder, or in any other way that may be suggested, and when fixed, however agreed upon, form the basis of an exemption of the bank and all its property? These circumstances would require close scrutiny, to be sure, and would shed their own light upon the question of the intention of the legislature, but if in any light the intention was plain, the exemption would stand. The basis for the logical conclusion under consideration would be an affirmance that no exemption of a bank and its property can inure to its benefit unless it be predicated of a tax on the bank itself or its property, which is obviously unsound. In thus presenting what seems to me the fallacy of that contention which would limit this exemption to one of any further tax upon

the shareholder in respect of his property in the share because, forsooth, the tax levied and demanded by the charter in consideration of the exemption is upon his property and not that of the corporation, I do not overlook the force of the fact that it is a specific tax, and that the surrender of the general taxing power is never to be presumed, but only call attention to the ease with which such an argument may be made to go beyond any real force that belongs to it.

The real question is, to what exemption do the words of the statute aptly apply? If they aptly present more than one construction so that there may be more than one exemption that may have been described by the words, which of them lies within the purport or design of the statute? Again, I say that the legislature was not constructing a revenue law carefully subdividing and classifying the subjects of taxation and legislating as to each of these in such manner as to regulate the tax on each with precision, but was constructing a bank charter and regulating the franchises, rights, privileges, immunities, duties and obligations of the bank. Presumably every provision in the charter pertains to the bank. In the absence of all other guidance it is the franchises, the privileges, rights, duties and immunities of the bank, or of the citizens authorized to become a corporation in their corporate, and not their individual, capacity with which the legislation is dealing. The citizens in their individual capacity and in relation to their individual property, more especially in relation to that distinctively individual property which each has a chose in action, called a share of the stock in that particular corporation which is being constructed, may come within the scope of the statute, and receive regulation by it, possibly; but clearly such provisions are secondary and subordinate, not primary and paramount, and if there be clearly a doubt in the statute as between these that which is primary and paramount in consideration or importance would be benefited in the resolution of the doubt rather than that which is secondary, subordinate or incidental. When the subject of taxation is presented in the process of constructing a bank charter it is the taxation of the bank itself, no matter what design of taxation is conceived, which is first in order of importance rather than of the individuals, in their individual capacity, who are authorized to be a bank corporation, and any words about taxation, if there be no ulterior purpose to accomplish by construction, will be construed with reference to the fact. The taxation of the given citizens above named as incorporators in their individual capacity belongs more directly to the general revenue act which is passed from time to time as the needs of the State require, and it is there where we would look, usually, for provisions taxing their property as well in corporation stocks as in other things. It is not suggested that they may not in relation to their property interest in the stock of the corporation undergoing construction be taxed by the charter, for they may, and conclusively have been, so far as this charter is concerned, as ruled by the Supreme Court of the United States in a case involving a charter just like this, but only because the words used in levying the tax have

been ruled to fairly and reasonably describe that kind of a tax. But *non constat* that any exemption granted in consideration of this taxation shall be, because it is that kind of tax and not some other, taken out of this rule of construing all provisions as applying to the bank rather than to the individuals composing it and attached inseparably to the tax itself and the owner of the thing taxed. The exemption is one thing; the tax another; and it is a mistake to suppose that they go indissolubly together and break down the rule of construction we are now applying just here. Granted that the legislature in its wisdom chose not to tax the franchise nor the capital stock, nor the other property of the bank, but to tax the shares in the hands of the shareholders to be paid, for convenience and certainty by the bank, vicariously, and not directly by the shareholder, and it does not follow at all that any provision found in relation to any exemption from further taxation is to be taken out of the general purport of the statute as one providing rights, privileges, immunities and duties for the corporation and limited and restricted to this secondary purpose of taxing the individuals and to give them the benefit of the exemption rather than the bank. The charter was not concerning these individuals, *que* individuals, but as incorporators and the tax and its accompanying exemption might have been both designed as a benefit to the corporators, albeit the tax was levied on the individuals and not the corporation, out of the natural order of things, considered with reference to the purpose in hand while making the charter. Because there was an aberration from the natural order in affixing the tax upon some one other than the bank it is not certain that the aberration was continued in extending the exemption from further taxation.

Again, if the exemption be considered as one granted solely for the benefit of the shareholders in their individual capacity, or each in his individual capacity, why should the benefit to them or to each of them be limited to a bare exemption from a further tax on each individual in respect of his share of stock and not reach further and include in its benefits that concomitant interest which each has in the bank—the interest of having it taxed as lightly as possible? If the shareholder has given a consideration for the exemption in a tax upon any property that he has, why should not the benefit of the exemption extend to all his corporate rights or interests represented in some sense at least by the shares—if the words and the scope of the legislation may include such extended benefits? There is no reason except that the State wishes now to restrict that which was granted to the narrowest possible limits by the strictest possible construction and with the danger of unfairly applying that strictness we have already dealt with in this opinion.

Let us now take the language of this act of the legislature, and reading it with a purpose not to abate or restrict the State's powers of taxation one jot beyond what the words fairly import, on the one hand, and a like purpose not to deprive the stockholders of any benefit granted to them as a basis for the investment of their money in this institution, on the other hand, and what does it mean? Both

sides contend that the sentence containing the exemption is elliptical. Each side supplies the ellipsis in its own way. The State would read the extended phrase, "which shall be in lieu of all other taxes upon said institution." Either reading would make the case clear for the party proposing it, but it is only another mode of presenting the contention between them. Taking the sentence as it is and the first criticism I should make would be the somewhat obscure, if not inaccurate use of the final words "other taxes" without a repetition. Also, in some form, of the word "pay," which is just as important in relation to the antecedent or as a part of the antecedent to which the relative pronoun "which" refers as the word "taxes." Remembering that this is not a revenue law but a charter—an act designed to define all that needs defining concerning "an institution," as it is called—and it seems to me a very unnecessarily narrow limitation, and one that is not fairly permissible to refer "which" only to the preceding word "tax" as its antecedent. The full sentence comprises two independent subjects, each a privilege or else one a privilege and the other an immunity, perhaps. One provides a lien upon the shares of stock as against the stockholder for his debts and the other this *amenity*, whatever its extent, from further taxation. Now why should the same breath, so to speak, create for the bank a lien and for some one else than the bank an immunity? The restriction of the relative pronoun "which" to the bare word "tax" is necessary to accomplish this and ignores wholly the leading words "said institution shall pay" as a part of the antecedent, which, it seems to me, is exactly the words "said institution shall pay to the State an annual tax," no matter what or how described, so far as it relates to the mere grammatical analysis of the sentence. Now if we are permitted to supply any ellipsis instead of adding to the end of the sentence words selected to express a given meaning, I should insert words expanding the relative pronoun into its proper antecedent and defining the word "other" in relation thereto, or in its relation to the subject of regulating by its charter the payment by the bank of taxes, whether its own taxes or those of some one else, not impossibly an entire stranger if the parties were so minded. Thus reconstructed, the sentence would take the form of full direction and read thus: "And said institution shall pay to the State an annual tax of one-half of 1 per cent. on each share of capital stock, which payment of this annual tax to the State shall be in lieu of all other payments of taxes for that year." This would be fairly within the scope of the whole act, which is constructing a charter for a bank and regulating the bank in the matter of its payment of taxes, the amount to be paid, the person to be paid, the frequency with which the payments must be made and the force and effect of the payment when made. The final word "taxes" loses none of its force, but gathers perspicuity by continued association in the construction with the word "pay" and the word "institution," for the benefit of which this whole act was constructed and passed. It is not even suggested in argument, much less claimed, that the very strictest construction of the words "to the State" would limit the exemption to one from

further State taxes and would not include any exemption from county or municipal taxes, but it is conceded that these are included so far as the shareholders' property is involved. Yet the rule of strict construction in favor of the taxing power of the State would be no more misapplied to such a limitation than the other.

Clearly the awkwardness of the sentence arises out of the compression of the idea into words and phrases that shall be brief and comprehensive rather than explicit. Grammatically, the analysis of its parts should be considered in relation to all that goes before, not only in the sentence, but likewise in the whole document or instrument. The "pregnant brevity" of the style should not be overlooked, as it affects the syntactical arrangement of the sentence. The phrase "in lieu of all other taxes"—which is the subject of the great contention between these parties—is, naturally, either an adverbial phrase modifying the verb "pay" or an adjective phrase qualifying the noun "tax," or rather the subject "annual tax." Strictly it should have been more closely placed to either the verb or the noun to display with precision the intention of the writer in that behalf, but unfortunately he has chosen to convert into a clause, introduced by a relative, as a co-ordinate and somewhat independant affirmation rather than as a modifier in the shape of either phrase or clause, adverbial or adjective; which arrangement intensifies that obscurity of meaning, giving rise to this lawsuit. If he had modified the verb by placing the words adverbially near it, the meaning would be quite plain in favor of the contention of the bank in this case, though it would still not be entirely free of doubt whether the bank was to be exempt or only the stockholder, or both, as any one may see, who will so reconstruct the sentence. So if he had modified the noun or subject "annual tax" by placing the phrase adjectively in immediate contact therewith the arrangement would have been somewhat more favorable to the State than now it is but scarcely less doubtful than by the present arrangement. Perspicuity required that there should have been an entirely new sentence or independent clause, at least, with more aptitude of expression to convey either of the meanings now contended for by these parties. The construction adopted forces us to determine whether the relative "which"—relative in form—is really intended to be relative or something else, and if used as a relative, whether it bears the simple subject "annual tax," or teems with the complex subject "said institution shall pay to the State an annual tax." I have already indicated my preference for the latter construction, simply because the act is dealing with the rights, duties, conduct, privileges and immunities of the "said institution;" primarily, and not with a tax upon the citizen or his property, individually. The word "which" gives writers a great deal of trouble, and its usage is varying, as the consultation of any standard work on grammar will show. It is often equivalent to "and it," or "that," used respectively. If either of these be substituted for it here the sentence reads more favorably for the contention of the State in this case, though it does not settle the doubt by any means. But this usage is said to be not generally observed by

modern writers in this century, and the rule is given that "which" is to be used in preference to "that" or "and it" whenever its clause introduces a new fact about the antecedent; that is to be preferred when the clause is dependent and limits or defines the antecedent. Maxwell's Adv. Gram. section 266, *id.* section 282. The use of the word in this sentence seems to accord with the rule, and the clause is independently introducing a new fact about the antecedent and not limiting or defining it. But what is the antecedent? "The antecedent may be a noun, a pronoun, a phrase or a clause." Max. Ad. Gram. section 280 *id.* 570, 572. See also Reid's Higher Eng. pp. 109, 113, 124, 122. It seems to me that to supply the simple word "tax" as the only antecedent here and to read "which tax shall be in lieu of all other taxes" is to adopt the restrictive and limited use of the equivalent "and it" or "that" and not to regard the introduction of a new fact about the antecedent which this clause is clearly intended to do. But if we take the whole preceding clause, viz: "Said institution shall pay to the State an annual tax of one-half of 1 per cent. on each share of capital stock," as our antecedent on
36 the new idea introduced by this clause, itself introduced by the relative "which," and the meaning becomes quite clear that this annual tax, whatever its character or nature, and upon whatever it may be levied, whether on property of the bank itself or somebody else's property, is a payment to the State by the bank—and, by the way, the security and certainty of this payment by the bank in a lump sum rather than collecting the same sum in driblets of more or less widely scattered stockholders is not to be overlooked as a part of the consideration given for the exemption—"which" shall be in lieu of all other payments by it of any taxes other than this, whether this be a tax upon its own, its stockholders', or any one else's property. It is a universal exemption for each recurring year from all other tax burdens than this, and this construction accords with the design or scheme to create an institution which shall be attractive to investors. If this were not the intention, if this were not the design or scheme, this provision, limited as the State would now limit it after so many years of acquiescence, has no appropriate place in the charter of a bank, but belongs more properly to a revenue law, and may quite as well have been left out, for it is almost demonstrable that the bare exemption from a higher rate of taxation upon the chose in action of the shareholder, directly levied upon him individually *qua* stockholders, and yet subject to a larger tax upon him, *qua* shareholder, by the indirect process of a tax upon the bank or its property belonging to him, *qua* shareholder, would be a mere shadow of the substance he desired and fairly might think he was obtaining. Indeed, it operates as a burden upon him over and above the ordinary stockholder not having this exemption, or may so operate, confessedly, under certain conditions. I cannot upon this analysis of the language of the charter apart from the adjudications, think that the legislature intended by those words anything less than a complete and universal

exemption of both the bank and the stockholder from any than the charter tax, however improvident it may have been.

Historically, this construction is supported by the surrounding circumstances at the date of this charter, in 1856. I have taken some pains to examine the legislation of this State and North Carolina so far as I could find it in both the grants of charters and the taxation of corporations by general revenue laws, and I find that this form of taxing corporations by a levy of 25 cents, or in one case not more than 50 cents, upon each share of stock, or by the levy of a fixed per centum upon each share, was the method in general use. There is not the least doubt that the legislature and the people understood this to be, practically, however, it might be in strict technical analysis of the nature of corporate property and its classifications, as well understood then as now among lawyers, a tax upon the corporate property, or a tax upon the corporation, to speak more broadly. The supreme court of the State had so decided as early as 1836, and it does not matter in the mere history of the subject that the Supreme Court of the United States 40 years later, and 20 years after the date of this charter, did not think this understanding correct, and ruled that it was a tax on the chose in action of the shareholder, which in the nicest technical classification is in no sense corporate property at all. The supreme court of Tennessee understood that it was not corporate property, and in 1836 called attention to it, and yet it was well known, historically, that such was the Tennessee method of taxing corporations. This charter must be read by the light of that fact in resolving any doubts about a limitation upon the exemption. It was not considered by the legal tribunals of the State or by the legislature that this charter tax was a tax upon the shareholder's chose in action, and if it be technically so, this charter, historically considered, was not constructed or acted upon by any one until now, in view of the fact or of any technical niceties arising out of it; and it seems to me plain enough to be unfair in construing the exemption to limit it by a resort to those niceties of classification as against the general understanding of the time of the grant, however unfair it may have been to exempt it by a resort to such niceties to include the stockholder in the exemption against the general understanding also. The courts do not arrive at the intention of the parties to a contract or reverse that intention by such exactness of classification, or rather by changes of opinion concerning it. As I have said before, it is my judgment that too much stress has been laid upon this arbitrary and by no means uniform and altogether artificial subdivision of corporate property into subjects of taxation. Taxing laws and fiscal systems may be wisely adapted to these classifications, and there may be highly useful, but in constructing the franchises of a charter they have no such dominant place as the argument here, and the theory of this claim for further taxation assigns to them, and must assign to them in order to escape the plain significance of this grant of exemption from taxation. It is not more competent to impair the obligation of the contract by assigning to the legislature a notion about the technical classification of the specific

thing taxed, which it is plain from surrounding circumstances the legislature cannot regard as material to the work in hand if they were aware of the technicality, as no doubt they were, it may be assumed than to otherwise unreasonably assign meanings to words which were not intended to be used in the meaning. In other words, I do not believe that the legislature intended to limit this exemption from taxation by any notion that it had or might have had concerning the precise technical character of the property upon which it levied the tax, as big corporate property or individual property. Whichever it was it had the right to tax it, and in consideration of that tax and other considerations to make the exemption as broad as it chose. The whole subject was open to it, and there is not the least indication in the act itself or the environment at its creation that this technical classification was deemed to be of the vast importance now attached to it. Here I will note that even a slight examination of the revenue laws of this and other States of text writers and of cases shows that there is no such fixity of subdivision and classification of corporate property any more than other property as would enable a court to affirm that this act was constructed in relation thereto and as would justify a resort to any classification that might be imagined as a conclusive evidence of intention in respect of this exemption. Exemption from taxation generally is applied to the owner and not to the thing, and we look rather to the person to be benefited than to the thing affected by it, while when we turn to the tax the thing becomes paramount rather than its owner. Hence the difference in looking at the act as a charter and not as a taxing act or a revenue law carefully affixing the burdens to each article of property, and this classification of subjects of taxation becomes of far less importance in the charter than it would be in the other. Besides shares of stock, although only individual choses in action of the owner and not corporate property, are often for obvious reasons of association of ideas confused with corporate property. Our legislature has, confessedly, so confused it, and our State judicial decisions have treated this as a tax on corporate property, and this is a practical application breaking down the distinction to that extent at least.

In Farrington *vs.* Tennessee, 95 U. S., 679, Mr. Justice Swayne enumerates the franchise, the accumulated earnings, profits and dividends and real estate, but it is only "some of the objects in this connection liable to taxation;" and the division used by the United States referred to by him is quite different, thus: Deposits, capital employed in their business, circulation, and notes of State banks used as money. And it is noticeable that while enforcing the technical distinction between a tax on shares or capital tax and a tax on capital stock itself as a subject of taxation in order to extend the exemption of the charter to the protection of the shareholder individually, he says also that "each share represents an aliquot part of the capital stock," thus indicating the same confusion by association that the Tennessee authorities proceeded upon. The truth is that "a share of stock" is a bare chose in action in its relation to the shareholder, as property; and in its relation to the

property of the corporation is a mere structural subdivision of all the property used as a convenient standard of measurement for parceling it out, very much as a bushel is used to describe quantities or to parcel out the wheat in a bin; and the term "shares of
37 capital stock" may be used appropriately in either of these senses, descriptively. Until there has been a dividend set aside to each shareholder his share, or a winding up and a residuum dividend, and set aside, to each shareholder his share, this chose in action or "share of stock" is very much like an empty bushel of "dry measure," which the owner of the wheat holds in hand ready to measure up and carry away his "share" when the division, either partial or complete, shall be made. This right of taking away may be made a separate subject of taxation, it is true, but so may the owner's horses, or mules, or cattle, swine and sheep, and all very arbitrarily, double taxation being easily avoided and not necessarily an incident of any given subdivision of corporate or other property for the purposes of taxation. But does this fact necessarily imply against words of universal signification that the exemption they grant shall be limited to the particular subject taxed? It does not seem to me a necessary implication, however useful and desirable it may be, or however well it may serve the State in escaping from its grant. If a farmer should contract with the State to take a fixed per centum upon a fixed value of his "horned cattle" every year as long as he should live "in lieu of all other taxes," and the business in which he was engaged were such that, presumably, a release from all taxation upon his farm and his farming operations was the benefit he and the State contemplated by the very making of the contract, could it be said that the fact that "horned cattle" was naturally or otherwise a separate subject of taxation would at all imply that the exemption should be limited to the further taxation of "horned cattle"? No matter how strictly the presumption against the surrender of the taxing power should be held, this implication would not be more reasonable because of that restriction.

Chief Justice Waite, in Tennessee *vs.* Whitworth, 117 U. S. 129, 136, makes a largely different enumeration of the elements of taxable value "sometimes found in corporations." He divides these elements thus: "1, franchises; 2, capital stock in the hands of the corporation; 3, corporate property, and 4, shares of the capital stock in the hands of individual stockholders." In Texas bankers were required to list for taxation money on hand, in transit, and in the hands of others subject to draft, except legal-tender notes, and their bills receivable and other credits. If any one of these had been taxed in a charter "in lieu of all other taxes." I do not think the mere fact that money could be so divided or that money and bills receivable were each a separate subject of taxation, would have necessarily limited the force of the words of exemption. Griffin & Heard, 14 S. W. R., 892. Nor if "deposits" in the savings banks, belonging in fact to other people, were taxed by their charters, as they were in the tax laws of Massachusetts one-half of 1 per cent. and the charters had made a contract that this should be in lieu of

all other taxes, as practically the non-taxation of anything else concerning the banks, except deposits, by the tax laws did, temporarily at least, exempt everything else, could it be claimed that the exemption of the charter would be necessarily limited to further taxation or deposits; because, forsooth, "deposits" were a separate subject of taxation not even belonging to the bank, or were, to use the language of Chief Justice Waite, found as an element of taxable value in corporations. Bank of Redemption *vs.* Boston, 125 U. S., 60, 67. I have noted other examples of these elements of taxable value found in corporations, and it is, I think, an assumption not justified by the facts to affirm that there is anything like such a fixity of this divisibility of the subjects of taxation, either in the theory or practice of taxation, as the argument here presupposes. I may add, in the language of another, that "we agree with counsel for the town that statutes exempting property from taxation should be construed with reasonable strictness; but they should not be so strictly construed as to defeat the obvious intention of the legislature." (New Haven *vs.* Sheffield Scientific School, 59 Conn., 163–166.)

I have given so much attention to the subject of this elemental divisibility of the subjects of taxation in its relation to corporations because I believe that upon it is based the fundamental fallacy of this attempt by the State to so construct a taxing act that it may evade the force of this exemption. It is predicated of a misconstruction of what has been said by the Supreme Court of the United States upon that subject, or rather upon a misapplication of it, unless the courts are to resort to these distinctions for the purpose of mitigating the decisions which have permitted the States to make bargain and sale of their taxing power without the possibility of any restoration of it, except in this mode of unreasonable strictness of refinements in the interpretations of statutory contracts.

Another view of the force of events connected with our legislative history, upon the subject of the taxation of corporations, relates to the practical construction of these acts by the legislature itself. Until this most recent taxing legislation involved in this suit, the revenue laws practically extended the exemption, with the fullest scope to all corporations, whether they had this charter exemption or not. I do not mean to say that the rate of taxation was always as favorable as is found in the charters. Counsel say that when this charter rate was first established it was largely in excess of the prevailing rate on other property, and has become to be less only because of the enormous increase in the rate of taxation. Possibly, they say, it may at some time become less again. However this may be, it is certain that for a very long time the legislature taxed only "each share of capital stock," supposing, as we have seen, that this was a tax on the corporation and not the stockholders, which error the Supreme Court of the United States has corrected; but the corporations were not otherwise taxed, nor were the shareholders for a long time, which was a practical construction of the meaning of these exemption charters, and justly other corpora-

tions not so favored were put on the same footing, not always precisely as to rate, sometimes less, sometimes more, but always as to the manner of taxation. It must be conceded to the State, as counsel argue, that it cannot be bound to any permanency or methods in taxation and may at will change its policy and methods, and nothing should be implied against this power. Neither do we imply anything against it. But, like all other parties to a contract, the State, when the question of its intention in the use of words arises, may be held to have intended by those words that which by its own acts has been placed upon them as a practical construction of their meaning. There is no injustice in this, nor yet any limitation upon its power to change its acts and reverse, if it chooses, its operations in that regard. Nevertheless, legislatures, like other men, interpret their words by their actions, and to this extent may those actions be examined, without the least restriction upon the power to change them at will. Both the individual interest or property of the shareholder and the property interest of the corporation, in its aggregate capacity, were exempt by this mode of taxation in the practical operations of government at the time these charters were granted, and for a very long time afterward, until this struggle to get in another tax, on one or the other, commenced, because, technically, it was not double taxation, to tax both, however burdensome it might be; and because, technically, it is a rule to favor the reservation of the taxing power, rather than its grant, in the interpretation of all charters. But, just as technically, it is the duty of the courts to follow the meaning of the words and hold the parties to the fair and reasonable intention they have manifested, most of all to each other, by those words.

Each side claims, with great earnestness and force of argument, that this question between them has been settled by the adjudications. The bank claims, at least in one of the cases, that the decisions have technically all the force of the principle of *res judicata*, and the decisions have been relied on, being apparent from the bill, to that extent. All that has been said heretofore would have been uselessly, if not impertinently, said if I were of that opinion. None of the decisions have, in my judgment, stripped to its bare technical proportions as an adjudication decided this question. Counsel for the State very properly says that the bank cannot rely on the overruled decisions of the supreme court of the State that this was a tax upon the corporate property and only an exemption
of the corporation itself and never an exemption of the
38 shareholder to protect it against further taxation of the
corporation; and then, upon the decision of the Supreme Court of the United States, overruling the others, that this is a charter tax upon the shareholder and not a tax upon the corporation and an exemption, therefore, of the shareholder also. The bank could do this if the Supreme Court of the United States had ever decided that a tax upon the shareholder and an exemption of his individual property in the share held by him from any further tax upon those shares extended the benefit of the exemption to the corporation property and the corporation in its corporate capacity.

The Supreme Court of the United States has never decided this, and for the very plain reason that such a question was never before it, and under the conditions of the cases, could not have been. It could have had no jurisdiction of such a question through the avenue of a writ of error from the supreme court of the State, because that court had never decided against any claim of the corporation from further taxation upon its capital shares, but always in favor of that claim.

Counsel for the bank concedes very frankly that since the Supreme Court of the United States decided the charter tax to be upon the shareholder and not the corporation, the supreme court of the State has continued to recognize the exemption as extending to the corporation and its property, notwithstanding that decision, but he argues that this is in violation of its own rule of judgment that the tax and the exemption go hand in hand and the latter is no broader than the former—which undoubtedly was the rule of the supreme court of the State until the decision of the Supreme Court of the United States above referred to as overruling the others. And, furthermore, he argues that it is in violation of the authority of the Supreme Court of the United States to so disregard its decision.

I do not care to deal with this conflict of authority, if it be such, nor its perplexities, for it is not necessary. My view is that whether this be a tax upon the corporation only or the shareholder only, the exemption is broader than the thing taxed and covers both the corporation and the shareholder. I take it we must all accept the view of the Supreme Court of the United States that this tax is a tax upon the shareholder only (Farrington *vs.* Tennessee, 95 U. S., 679). But *non constat* that the exemption, the stipulation of the character that this tax upon the shareholder only, shall be in lieu of all other taxes, does not extend to the corporation and its property as well as to the shareholder. I have written this opinion to justify my own judgment that it does. The Supreme Court says it covers any further tax against the shareholder. It does not say that it excludes from the exemption the corporation and its property, nor does it say that it includes it. Until it does say one or the other, we must be contented to get along without its paramount authority. If it should follow the example of the supreme court of the State, which held that this being a tax upon the corporate property only, the exemption did not include a tax on the shareholder's property, it will undoubtedly overrule this judgment and the decision we are now making, if it adheres to the ruling already made that it is a tax on the shareholder only. If, however, it follows the later example of the supreme court of the State and interprets the Farrington case, *supra*, as that court interprets it to cover also in the exemption the corporation and its property, it will affirm the judgment we make and for the reason that we give, namely, that although the tax is on one the words of the exemption cover both. So, although I do not think with the supreme court of Tennessee that the Supreme Court of the United States has already decided the exemption to cover both, I do think it does cover both, and that the court of last resort will so determine. I

need not, therefore, further consider the cases in relation to the plea (or demurrer equivalent to such a plea) of *res judicata*. I should say, however, that in strict technical consideration the supreme court of the State has only inferentially decided that the exemption extends to both the capital stock of the corporation and the shares of the shareholders, the tax assessed and rejected being one under a general law assessing the real property of all persons, assumed by the assessor to extend to the property of the bank, notwithstanding the exemption, and the point was not presented as it now is by a specific tax by the legislature upon the capital stock as the property of the corporation. Inasmuch as the property assessed by the assessor under the general law could only be exempt under the charter and because there is no distinction, possibly between real estate in which the capital stock is invested and the capital stock itself, the decision is in favor of the exemption of the capital stock, inferentially, but not directly. (Bank of Commerce *vs.* McGowan, 6 Lea, 703; The State *vs.* Butler, 13 Lea, 400, 406; The State *vs.* Butler, 15 Lea, 104; State *vs.* Butler, 86 Tennessee, 614.)

The foregoing are the cases of the State supreme court since the Farrington case in the Supreme Court of the United States which was decided there in 1877 and in the supreme court of the State in 1876 (Memphis *vs.* Farrington, 8 Bax., 539; Farrington *vs.* Tennessee, 95 U. S., 679). The first was an assessment of this defendant bank upon its real estate under the general law, and it was held that the decision of the Supreme Court of the United States had extended the exemption of the charter to shareholders, contrary to the opinion of that court, and "therefore," the exemption would "protect the capital stock and the shares of the stockholders from any taxation beyond that prescribed in the charter." The next case involved the Union & Planters' bank, having a like exemption, and the same view was taken of assessments under the general law upon its real estate and of the effect of the Farrington decision by the Supreme Court of the United States, but, as before remarked, whatever may be inferred as to the ruling it may make on the questions we have here or the potency of these decisions, they did not involve the levy by the legislature of a specific tax upon the capital stock, such as has been made under recent legislation. The other cases were a direct attack by bill upon the organization of the banks and a denial of their right to any exemption because of want of title to their corporate franchises and did not involve this question. On the whole, I think these cases support the ruling we are making, though I do think with counsel for the State that they give too much force to the ruling of the Supreme Court of the United States as an adjudication of the question, and hence I have examined it in that view. The cases prior to the Farrington case treat the charter tax and the exemption as limited to the corporate property and as excluding the shareholder and his property. Their importance here rests in the fact that they hold that being a tax only on the corporate property the exemption does not extend further than the tax—that is, does not exempt anything except the property taxed by the charter from further taxation. If that was true as to cor-

porate property it is true now as to the stockholder's property, and the Supreme Court of the United States having ruled the charter tax a tax on the shareholder's property, under the same rule the corporate property would not be now exempt. And herein lies the force of the State's case now, but for the reasons stated I do not assent to this narrow view of the exemption, and not being guided by any authoritative adjudication to that effect feel at liberty to enforce my own view as to the law of this case, particularly since these cases have been reversed on the main point as to the nature of the tax, whether they have been effected as to the other concerning the restriction of the exemption because of the specific tax, or not. (Union Bank *vs.* State, 9 Young, 489; De Soto Bank *vs.* Memphis, 6 Bax., 415; Memphis *vs.* Hernando Insurance Company, *id.* 527; Memphis *vs.* Farrington, 8 Bax., 540.)

The decisions of the Supreme Court of the United States before the Farrington case have been sufficiently noticed by that case itself and the decisions of the supreme court of Tennessee and do not require any notice at my hands. I have already stated that, in my view, that case only decides that this charter tax is a tax upon the property of the stockholders and not upon the corporate property, and that the exemption protects at least the property of the stockholder, but whether it protects also the property of the corporation has not been decided. The cases since that time are quite numerous and all are instructive upon the general subject, but none of them is decisive of this case. The case of New Orleans *vs.* Houston, 119 United States, 265, it seems to me, quite nearly decides that a tax like this is a tax on the capital stock and not on the share-
39 holders, but there the taxing act was thus arranged to defeat the exemption of the payment of a gross sum. If the language of that act so clearly indicating a tax on the shareholder was in fact a tax on the corporation, this might be so held also, as it was in Tennessee, but the Farrington case is directly conclusive on this view and we are not at liberty to follow the latter case even if it could be taken. In conclusion I repeat that the language of this charter levying "an annual tax of ½ of 1 per cent. on each share of capital stock" is so ambiguous that it may descriptively designate a tax on either the corporate property in the capital stock or the individual property in the shares and the Supreme Court of the State and the United States have disagreed on this point; but, in my judgment, whether it be one or the other, the exemption which is given by the words "which shall be in lieu of all other taxes," is a protection of both the corporate property and the individual property in the capital stock and its shares, and neither court has decided this point explicitly since the Supreme Court of the United States determined it to be a tax on the individual property of the shareholder; although the supreme court of the State has recognized this full scope of the exemption.

The same ruling applies to the privilege tax as well as to that upon the capital stock and for the same reason.

The bank has largely increased, by authority of law, its capital stock since the original charter, and there is another contention that

since the constitution of 1870 forbids these special privileges, the exemption must be limited to the amount of the old stock and cannot include the new. It is manifest in the view we have taken that unless the charter restricts the power to increase, either by fixing it definitely or by words that forbid any further additions to the capital stock, the charter itself would confer the right of increase. This charter has no limitation as to that right and the privilege is undeniable, perhaps, under the charter. But the words of the exemption are broad, and what we have said of it universally includes any authorized increase of capital, as well as the rest. The charter has not a word to indicate any such restriction of the exemption nor anything from which it may be implied, and it seems to me that the constitution cannot affect its force any more than the statute could. If the constitution had expressly ordained that the exemption of the bank should be limited to the amount of the original subscription, or to that which existed when the constitution was passed, unless the charter itself had contained some restriction of the amount of capital stock authorized, it would have been invalid as impairing the obligation of the contract if the right of increase be a charter privilege.

Demurrer sustained and bill dismissed.

So ordered.

40 *Prayer for Appeal. Filed April 22d, 1892.*

Circuit Court of the United States, Western District of Tennessee.

STATE OF TENNESSEE, for Use of City of Memphis, and CITY OF MEMPHIS
vs.
BANK OF COMMERCE and J. A. OMBERG. } In Equity. No. 438.

To the hon. the judges of the circuit court of the United States for said district:

Come again the complainants in the above-entitled cause, by their solicitors, and petition the court for an appeal to the Supreme Court of the United States from the decree entered in said cause by said circuit court on the 31st day of March, A. D. 1892; and your petitioners will ever pray, etc.

THE STATE OF TENNESSEE, FOR USE, ETC.,
AND THE CITY OF MEMPHIS,
By METCALF & WALKER,
F. T. EDMONDSON,
Solicitors for said Complainants.

Memphis, Tennessee, April 22d, A. D. 1892.

41 *Assignment of Errors. Filed April 22d*, 1892.

Circuit Court of the United States, Western District of Tennessee.

STATE OF TENNESSEE, for Use, etc., and CITY OF MEMPHIS
vs.
THE BANK OF COMMERCE and J. A. OMBERG. } No. 438.

The State of Tennessee and the city of Memphis say that the decree herein rendered on the 31st of March, 1892, is erroneous in the respects following, to wit:

I.

In that said decree sustains the demurrer of the defendants and dismisses the bill herein. The said demurrer should have been overruled.

II.

In that it is ruled and adjudged by said decree that the capital stock and franchises of the defendant The Bank of Commerce is exempt from all municipal taxes by virtue of its charter. It should have ruled that the charter of the defendant bank exempted only the shares of stock therein from any tax other than the one-half of one per cent. stipulated to be paid under and by virtue of the charter contract.

42 III.

In that the said decree ruled and adjudged that the shares of stock in said bank were exempt from all taxes other than that stipulated to be paid by the charter. It should have ruled that the shares of stock in said bank were subject to the taxing power of the State.

IV.

In that the court refused to rule that the State had power to tax the new or increased capital stock or shares of stock in said bank subscribed and paid in after the adoption of the constitution of the State of Tennessee on May 5th, 1870. The court should have ruled that the constitution aforesaid annulled and repealed all power on the part of the defendant bank to increase its capital stock and to hold the same exempt from the taxing power of the State. The State had power to tax either the capital paid in or the shares of stock issued after the adoption of the constitution of the State on May 5th, 1870, and it should have been so ruled.

METCALF & WALKER,
F. T. EDMONDSON,
Solicitors for Complainants.

43 UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee.

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof begun and held for its November term, A. D. 1891, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 22d day of April, A. D. 1892, in the following cause, to wit:

STATE OF TENNESSEE, for Use, etc., and CITY OF MEMPHIS, Plaintiff-,
vs.
THE BANK OF COMMERCE and J. A. OMBERG, Defendant-. } No. 438.

This day came again the complainants to this cause, by their solicitors of record, and file herein their petition for an appeal to the Supreme Court of the United States from the final decree entered herein against them on the 31st day of March ultimo, together with their assignment of errors in such behalf, and pray for such appeal; and for satisfactory reasons to the court appearing the prayer of the said petition is hereby granted, and the appeal therein hereby *hereby* prayed for is allowed.

[Endorsed:] No. 438. Circuit court of the United States, western district of Tennessee. State of Tenn., for use, *et al. vs.* Bank of Commerce *et al.* Order of court. Entered and filed 22d day of April, A. D. 1892. John B. Clough, clerk, by —— ——, deputy.

44 *Appeal Bond. Filed April 22d, 1892.*

Circuit Court of the United States, Western District of Tennessee.

STATE OF TENNESSEE, for Use, etc., and CITY OF MEMPHIS
vs.
THE BANK OF COMMERCE and J. A. OMBERG. } No. 438.

Know all men by these presents that we, The State of Tennessee and The City of Memphis therein, as principals, and W. L. Clapp and Jno. J. Shea, as sureties, are held and firmly bound unto the Bank of Commerce and J. A. Omberg in the sum of five hundred dollars, to be paid to the said obligees; to which payment, well and truly to be made, we and each of us bind ourselves, jointly and severally, and our and each of our successors, heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Signed and dated at Memphis, Tennessee, this 22d day of April 1892.

Whereas the above-named State and city have prosecuted an appeal to the Supreme Court of the United States to revise the decree and judgment rendered in the above-entitled cause by the cir-

cuit court of the United States within and for the western division of the said western district of Tennessee:

45 Now, therefore, the consideration of this obligation is such that if the above-named complainants shall prosecute said appeal to effect and answer all costs and damages if *it* shall fail to make good *its* plea, then this obligation shall be void; otherwise remain in full force.

STATE OF TENNESSEE,
By S. P. WALKER, *Sol'r.*
CITY OF MEMPHIS,
By S. P. WALKER, *Sol'r.*
W. L. CLAPP.
JNO. J. SHEA.

The foregoing bond is hereby approved by me, at Memphis, Tennessee, this April 22d, 1892.

E. S. HAMMOND, *Judge.*

46 THE UNITED STATES OF AMERICA, }
Sixth Judicial Circuit, Western District of Tennessee. }

I, John B. Clough, clerk of the circuit court of the United States for the western division of said western district of Tennessee, do hereby certify that the papers hereto attached are full, true, perfect, and correct copies of the originals and of the entire record and proceedings in said court as the same now appear of record and upon the files in my office in the following cause, to wit, State of Tennessee, for use, etc., and City of Memphis *vs.* The Bank of Commerce and J. A. Omberg, No. 438.

Seal of the Circuit Court of the United States for the District of West Tennessee.

In testimony whereof I have hereunto set my name and affixed the seal of said court, at office, in the city of Memphis, Tennessee, this 23d day of April, A. D. 1892, and of the Independence of the United States the 116th year.

JOHN B. CLOUGH, *Clerk.*

47 [Endorsed:] No. 438. Circuit court of the United States, western district of Tennessee. State of Tennessee, for use, etc., and City of Memphis *vs.* Bank of Commerce, J. A. Omberg.

48 UNITED STATES OF AMERICA:

To the Bank of Commerce and J. A. Omberg, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the 20th day in May, 1892, pursuant to an appeal from a decree of the circuit court of the United States for the circuit and western district of Tennessee, wherein The State of Tennessee, for the use of the city of Memphis, and The City of Memphis are plaintiffs and you are defendants in error, to show cause, if there be any, why the judgment and decree in the said appeal mentioned should

not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable E. S. Hammond, judge of the district court of the United States for the western district of Tennessee, this 22d day of April, A. D. 1892.

E. S. HAMMOND, *Judge.*

49 [Endorsed:] No. 438. Circuit court of the United States, western district of Tennessee. State of Tennessee, for use City of Memphis *vs.* Bank of Commerce, J. A. Omberg. Citation. Filed the — day of ——, A. D. 187–. H. E. Andrews, clerk. —— ——, D. C.

Marshal's Return.

At Memphis, Tennessee, on this 22d day of April, A. D. 1892, I duly executed this writ on the defendant J. A. Omberg by making known to him the contents thereof and giving him a true copy of the same, and at the same time and place I further executed this writ on the defendant Bank of Commerce by making known contents thereof & delivering copy of same to S. H. Dunscomb, president of said bank.

J. W. BROWN,
U. S. Marshal,
By J. M. COMPTON, *Deputy.*

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Endorsed on cover: Case No. 15,060. W. Tennessee C. C. U. S. Term No., 761. The State of Tennessee, for use of city of Memphis, and The City of Memphis, appellants, *vs.* The Bank of Commerce and J. A. Omberg. Filed June 21, 1892.

1021

Supreme Court U. S.
FILED.
JAN 5 1894
JAMES H. McKENNEY,
CLERK.

Opinion of Judge Hammond.

THE STATE, ET AL.,

vs.

BANK OF COMMERCE,

IN CIRCUIT COURT OF UNITED STATES,

—AND—

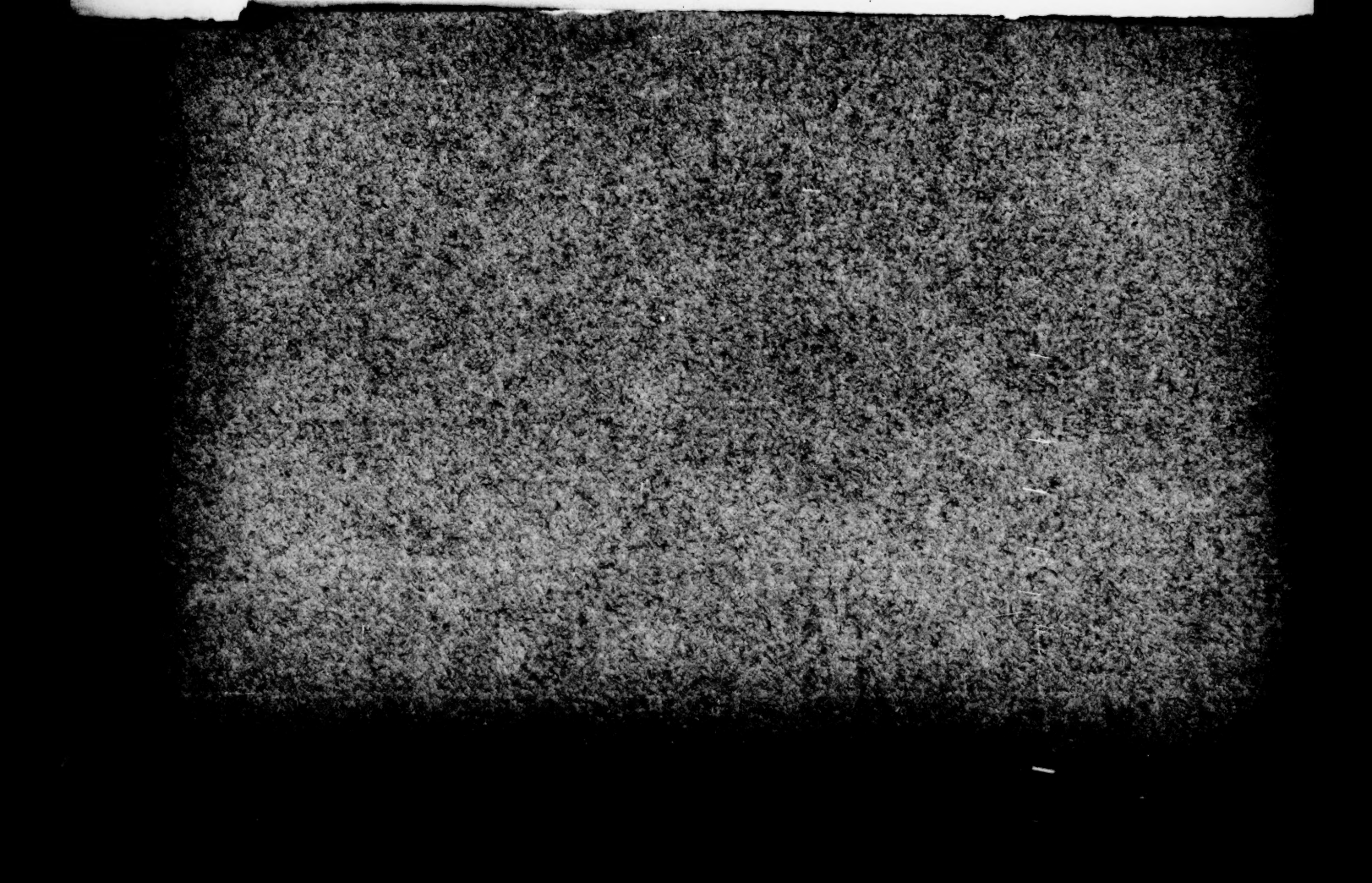
THE STATE, ET AL.,

vs.

HERNANDO INSURANCE CO.
UNION AND PLANTERS BANK,
HOME INSURANCE CO.
PHŒNIX FIRE AND MARINE INS. CO.
BLUFF CITY INSURANCE CO.
MEMPHIS CITY BANK,

IN CHANCERY COURT OF SHELBY COUNTY, TENN.

Tracy Printing Co., Memphis.



Opinion of Judge Hammond

THE BANK OF COMMERCE CASE.

STATE OF TENNESSEE, ET AL.,

vs.

BANK OF COMMERCE, ET AL.,

UNITED STATES CIRCUIT COURT, W. D. TENNESSEE, IN EQUITY, MARCH, 1892.

THE CASE STATED.

Hammond, J.: The charter of the defendant bank contains this clause: "Said institution shall have a lien on the stock for debts due it by the stockholders before and in preference to other creditors, except the State for taxes, and shall pay to the State an annual tax of one-half of one per cent. on each share of capital stock, which shall be in lieu of all other taxes." This bill is filed to collect taxes for the years 1887 to 1891, inclusive, amounting in the aggregate to $46,068.75. The taxes are assessed under Acts of the Legislature, which provide, among other things, as follows: "And in cases in which, by the terms or legal effect of the charter, the shares of stock in any corporation are wholly or partially exempt from taxation, or in which a rate of taxation on the shares of stock is fixed and prescribed and declared to be in lieu of all other taxes, taxes for State, county and municipal purposes shall be assessed and levied at a rate uniform with the rate levied upon other taxable property upon the capital stock of said corporation,

the value of which capital stock shall be fixed and returned by the Assessor as being equal to the aggregate market value of all the shares of stock in said corporation, including the net surplus."

The Bill sets out historically the legislation concerning the taxation of the bank, previous attempts to collect taxes thereunder, certain litigation arising concerning those attempts and generally so states the facts that by the demurrer which the defendant has filed the question is presented whether or not the assessment sought to be enforced is valid in relation to the claim made by the bank that the legislation violates the obligation of the charter contract, and is void under the Constitution of the United States. A Federal question being thus at issue the case was removed to this Court from the State Chancery Court, wherein the Bill was originally filed.

COMMON MEANING.

Apart from any embarrassments arising out of the adjudications that have concerned this charter, and others precisely like it, in respect of the subject of taxation, I conceive that the ordinary use of the phrase, "in lieu of all other taxes," as distinguished from any technicalities whatsoever, always imports that none other than the tax specified, however described, can be demanded. Nor, so apart, should I conceive that it was at all material by what designation the sum to be paid "in lieu" of other sums might be called, whether a tax, a bonus, a price paid for the privilege or a debt or obligation of any designation whatsoever; nor whether the sum, however called, should be absolutely fixed, should be ascertainable by some self-adjusting standard or some scheme or method so devised that the amount could be readily known; nor whether the second party to the contract should have the sum to pay, individually, or in some aggregate capacity, or that it should be paid by some one else, or in some other way designated in the contract. If this were an ordinary contract between individuals all these

varying conditions would be absolutely open to any arrangements the parties might choose to make. So they were to the State of Tennessee and Samuel R. McCamy, James Whitesides, John L. M. French, Edwin Marsh and James C. Warner, "their associates and successors," when they set about the business of constructing "an institution," which has developed into the "Bank of Commerce." It is altogether true that in and about that business, and in drawing up the "contract" in the form of a "charter" to manifest the agreement of the parties, the State will not be presumed to have curtailed its powers of taxation further than the words of the instrument shall plainly express, or by necessary implication shall be plainly indicated, but otherwise all the conditions above suggested were open to those parties, absolutely. The same rule of plain expression or necessary implication applies in the construction of all contracts, not more to charters than to others, except that the courts, perhaps, are more careful in dealing with such cases than others for obvious reasons of public benefit, though in strictness the courts should not less carefully deal with any contract whatever.

It is an exaggeration of this carefulness, however, to suppose that the words of a contract about the taxation of a bank are to be differently construed than the same words about any other subject to which they would fitly apply, merely because they are applied to a matter of taxation of a corporation with an irrepealable contract of exemption. The same carefulness of construction about any other subject would produce the same result. If, for example, these citizens had made a contract with the State to build the capitol, and it had been provided that they should pay to the State from time to time a tax of one-half of 1 per cent. on each installment of the money paid out by them for the work, "which shall be in lieu of all other taxes," could it be said that these words would receive any other construction than they do when they are applied to the taxation of a corporation or its stock? Or

that, because the power of the State was supreme in the premises, and it might, in addition to this tax, have levied a tax upon these citizens individually, each for himself, or upon the whole in the aggregate, a further sum for the privilege of having had the contract awarded to them, or a further tax upon the property used in the construction of the capitol—so much for the stone, so much for the iron, and so on, if you please—can it be that these circumstances would change, in any respect, the meaning of the words? A habit of doing business in this regard by the State, and of levying the tax in a particular manner, would aid a court in arriving at the meaning of the contract undoubtedly, but, after all, the words would stand out as expressing that intention to have been just what they import to a fair intelligence, unobscured by any subtleties of meaning developed to accomplish a particular purpose of evading their force and mitigating the unpleasant or undesirable results of their use. It were better that the courts should boldly overrule the decisions which have shackled the sovereign power of the State over taxation than to resort to mere subtleties of construction that shall break down the plain meaning of plain words to the plain people who invest their money upon the understanding that plain people have of such words.

STRICT CONSTRUCTION.

Another fact to be remembered while reading this statutory contract is that it is not a revenue law; it is not a statute concerned with the exercise of a taxing power, except incidentally, as it were. The power of the State in the matter of selecting the subjects of taxation, and in dividing and subdividing those subjects at pleasure, is quite absolute, whether in relation to banks or other corporations and their corporate property, or to the property of citizens. Naturally corporate property by its very character, suggests a somewhat uniform classification or subdivision for taxing purposes, but, as will be presently shown, there is no fixed or always uniform

classification from which so much can be implied as has been urged in argument here. Ordinarily we say that there is, first, the franchise; second, the capital stock; third, the shares of stock, which, in the strictest sense, however, are not corporate property at all, but the property of the individual holder, unless there be confusion in the use of the term; and fourth, the other property, not included in any of the other three. But this natural and convenient subdivision is not always adhered to, and is often still further subdivided, and might be subject to almost innumerable subdivisions, just as other property may be. Even the franchises may be separated into different subjects of taxation by taxing each that is granted separately; the capital stock in the very beginning might be subdivided into gold and silver money and legal-tender paper money, if there be such paid in; afterward into bonds, bills receivable, mortgages, exchange, etc., etc.; then profits or income or surplus might be separately taxed, and often is; and the ordinary subdivisions of real and personal property might be carried on as they often are in revenue laws, almost *ad infinitum*.

But, as before remarked, this is not a revenue law engaged with such subdivisions, and it seems to me rather too much stress has been laid upon the separable subjects of taxation in relation to corporate property as an element in the construction of this charter. It is true that the cases look to it very closely, and it has been seized upon as a very convenient pathway out of the difficulty of maintaining restrictions upon the sovereign power of taxation which seem disastrous to that power. Yet I do not think the cases have broken down the ordinary rules of statutory construction, and established a special rule, based upon these arbitrary subdivisions, to be applied to corporate charters for the purpose of saving the State from the improvidence of those who have fettered this power. The rule of strict construction has been established beyond question, but the cardinal rule remains that the intention of the parties must

fairly be ascertained, and it has not been established that an unfair advantage shall be given one of them because it is a State, has not made a wise bargain and has granted that which should have been withheld. The strictest adherence to the cases does not require of the Court anything more than a rigid observance of the rule that the State shall not, by anything short of express words or necessary implication, be held to have surrendered one iota of its taxing power. But it is a perversion of this principle to hold that if, by any possible narrowness of construction, any subtlety of reasoning or any nicety of verbal interpretation the taxing power may be saved, the courts shall save it at the sacrifice of the other parties to the contract, who have put their money on the faith of the State to stand by that which it has fairly granted in the way of exemption from taxation.

SUBDIVISION OF TAXATION.

Another consideration before we take up the language of the Act is pertinent here. Next to this rule of strict construction the State insists upon treating this charter tax as one strictly levied upon the shares of stock in the hands of the individual shareholders, and consequently claims that the exemption is one belonging to the shareholder alone, applicable only to him and his property interest and not at all to the bank. But if it be granted that the tax is of that precise nature, does the conclusion follow, necessarily, in logical sequence? Concede that a tax upon the shareholder is not a tax upon the bank, directly or indirectly, and grant this premise also, that the surrender of the taxing power shall never be presumed, and does the conclusion follow, inevitably, that an exemption of their bank and its property may not be granted to these shareholders in consideration of a charter tax upon them individually or their property? Why may not the Legislature, with all conditions open to it, as they were, exempt the bank from all taxation in consideration that the share-

holders shall pay a tax, fixed no matter how by agreement between them, either upon their shares in that bank or any other property the shareholder might own? Why could not they agree that such an exemption should be granted to the bank if each stockholder should pay his share of the tax and secure it by a lien, say upon his land, for an example? Or why might the tax not be fixed at so much per acre of the land held by each shareholder, or in any other way that may be suggested, and when fixed, however agreed upon, form the basis of an exemption of the bank and all its property? These circumstances would require close scrutiny, to be sure, and would shed their own light upon the question of the intention of the Legislature, but if in any light the intention was plain the exemption would stand. The basis for the logical conclusion under consideration would be an affirmance that no exemtion of a bank and its property can inure to its benefit unless it be predicated of a tax on the bank itself or its property; which is obviously unsound. In thus presenting what seems to me a fallacy of that contention which would limit this exemption to one of any further tax upon the shareholder in respect of his property in the share because forsooth the tax levied and demanded by the charter in consideration of the exemption is upon his property and not that of the corporation, I do not overlook the force of the fact that it is a specific tax, and that the surrender of the general taxing power is never to be presumed, but only call attention to the ease with which such an argument may be made to go beyond any real force that belongs to it.

The real question is: To what *exemption*, and not to what *tax*, do the words of the statute aptly apply? And it is a begging of this question to assume that the exemption shall be confined to a bare release from further taxation of the thing taxed, and that only. If they aptly present more than one construction so that there be more than one exemption that may have been described

by the words, which of them lies within the purport or design of the statute? Or, may more than one statute be included? Again, I say that the Legislature was not constructing a revenue law carefully subdividing and classifying the subjects of taxation and legislating as to each of these in such manner as to regulate the tax on each with precision, but was constructing a bank charter and regulating the franchises, rights, privileges, immunities, duties and obligations of the bank. Presumably every provision in the charter pertains to the bank. In the absence of all other guidance it is the franchises, the privileges, rights, duties and immunities of the bank, or of the citizens authorized to become a corporation in their corporate and not their individual capacity, with which the legislation is dealing. The citizens in their individual capacity and in relation to their individual property, more especially in relation to that distinctively individual property which each has as a chose in action, called a share of the stock, in that particular corporation which is being constructed, may come within the scope of the statute, and receive regulation by it, possibly; but clearly such provisions are secondary and subordinate, not primary and paramount, and if there be clearly a doubt in the statute as between these that which is primary and paramount in consideration or importance would be benefited in the resolution of the doubt rather than that which is secondary, subordinate or incidental. When the subject of taxation is presented in the process of constructing a bank charter it is the taxation of the bank itself, no matter what design of taxation is conceived, which is first in order of importance rather than of the individuals, in their individual capacity, who are authorized to be a bank corporation, and any words about taxation, if there be no ulterior purpose to accomplish by construction, will be construed with reference to that fact. The taxation of the given citizens above named as incorporators in their individual capacity belongs more directly to the general revenue act which is passed from time

to time as the needs of the State require, and it is there we would look, usually, for provisions taxing their property as well in corporation stocks as in other things. It is not suggested that they may not in relation to their property interest in the stock of the corporation undergoing construction be taxed by the charter, for they may, and conclusively have been, so far as this charter is concerned, as ruled by the Supreme Court of the United States in a case involving a charter just like this, but only because the words used in levying the tax have been ruled to fairly and reasonably describe that kind of a tax. But *non constet* that any exemption granted in consideration of this taxation shall be, because it is that kind of tax and not some other, taken out of this rule of construing all provisions as applying to the bank rather than to the individuals composing it and attached inseparably to the tax itself and the owner of the thing taxed. The exemption is one thing: the tax another; and it is a mistake to suppose that they go indissolubly together and break down the rule of construction we are now applying just here. Granted that the Legislature in its wisdom chose not to tax the franchises, nor the capital stock, nor the other property of the bank, but to tax the shares in the hands of the shareholders to be paid, for convenience and certainty by the bank, vicariously, and not directly by the shareholder, and it does not follow at all that any provision found in relation to any exemption from further taxation is to be taken out of the general purport of the statute as one providing rights, privileges, immunities and duties for the corporation and limited and restricted to this secondary purpose of taxing the individuals and to give them the benefit of the exemption rather than the bank. The charter was not concerning itself with these individuals, *qua* individuals, but as incorporators and the tax and its accompanying exemption might have been each designed as a benefit to the corporation, and consequently its individuals, also, albeit the tax was levied on the individuals only, and not the corporation, out of the natural order of

things, to be sure, considered with reference to the purpose in hand while making a charter. But because there was an aberration from the natural order in affixing the tax upon some one or some thing other than the bank, it is not certain that the aberration from the natural order of legislation was continued in providing the exemption from further taxation.

Again, if the exemption be considered as one granted solely for the benefit of the shareholders in their individual capacity, or each in his individual capacity, why should the benefit of the exemption to them or to each of them be limited to a bare release from a further tax on each individual in respect of his share of stock and not reach further and include in its benefits that concomitant interest which each has in the property of the bank—the interest of having that taxed as lightly as possible? If the shareholder has given a consideration for the exemption in a permanent tax upon any property that he has, why should not the benefit of the release extend to all his corporate rights or interests represented in some sense at least by the shares—if the words and the scope of the legislation may include such extended benefits? There is no reason except that the State wishes now to restrict that which was granted to the narrowest possible limits by the strictest possible construction and with the danger of unfairly applying that strictness we have already dealt with in this opinion.

GRAMMATICAL CONSTRUCTION.

Let us now take the language of this Act of the Legislature, and reading it with a purpose not to abate or restrict the State's powers of taxation one jot beyond what the words fairly import, on the one hand, and a like purpose not to deprive the stockholders of any benefit fairly granted to them as a basis for the investment of their money in this institution, on the other hand, and what does it mean? Both sides contend that the sentence containing the exemption is elliptical. Each side supplies the ellipsis in its own way.

The State would read the extended phrase: "which shall be in lieu of all other taxes upon said shares of stock;" the bank would read it: "which shall be in lieu of all other taxes upon said institution." Either reading would make the case clear for the party proposing it, but is only another mode of presenting the contention between them. Taking the sentence as it is and the first criticism, I should make, would be the somewhat obscure, if not inaccurate use of the final words "other taxes" without a repetition also, in some form, of the word "pay," which is just as important in relation to the antecedent or as a part of the antecedent to which the relative pronoun "which" refers as the word "taxes." Remembering that this is not a revenue law, but a charter—an Act designed to define all that needs defining concerning "an institution," as it is called—and it seems to me a very unnecessarily narrow limitation and one that is not fairly permissible, to refer "which" only to the preceding word "tax" as its antecedent. The full sentence comprises two independent subjects, each a privilege, or else one a privilege and the other an immunity, perhaps. One provides a lien upon the shares of stock as against the stockholder for his debts and the other this immunity, whatever its extent, from further taxation. Now, why should the same breath, so to speak, create for the bank a lien, and for some one else than the bank an immunity? The restriction of the relative pronoun "which" to the bare word "tax" is necessary to accomplish this and ignores wholly the leading words "said institution shall pay" as a part of the antecedent, which, it seems to me, is exactly the words "said institution shall pay to the State an annual tax," no matter what or how described, so far as it relates to the mere grammatical analysis of this sentence. Now, if we are permitted to supply any ellipsis instead of adding to the end of the sentence words selected to express a given meaning, I should insert words expanding the relative pronoun into its proper antecedent and defining the word "other" in relation thereto, or in its relation to the

subject of regulating by its charter the payment by the bank of taxes, whether its own taxes or those of some one else, not impossibly an entire stranger, if the parties were so minded. Thus reconstructed the sentence would take the form of full direction and read thus: "and said institution shall pay to the State an annual tax of one-half of 1 per cent. on each share of capital stock, which payment of this annual tax to the State shall be in lieu of all other payments of taxes for that year." This would be fairly within the scope of the whole Act which is constructing a charter for a bank and regulating the bank in the matter of *its* payment of taxes, the amount to be paid, the person to be paid, the frequency with which the payments must be made and the force and effect of the payment when made. The final word "taxes" loses none of its force, but gathers perspicuity by continued association in this construction with the word "pay" and the word "institution," for the benefit of which this whole Act was constructed and passed. It is not even suggested in argument, much less claimed, that the very strictest construction of the words "to the State" would limit the exemption to one from further *State* taxes, and would not include any exemption, from county or municipal taxes, but it is conceded that these are included so far as the shareholders' property is involved. Yet the rule of strict construction in favor of the taxing power of the State would be no more misapplied to such a limitation than the other.

Clearly the awkwardness of the sentence arises out of the compression of the idea into words and phrases that shall be brief and comprehensive rather than explicit. Grammatically the analysis of its parts should be considered in relation to all that goes before, not only in the sentence, but likewise in the whole document or instrument. The "pregnant brevity" of the style should not be overlooked, as it affects the syntactical arrangement of the sentence. The phrase "in lieu of all other taxes"—which is the subject of the great contention between these parties—is,

naturally, either an adverbial phrase modifying the verb "pay" or an adjective phrase qualifying the noun "tax," or rather the subject "annual tax." Strictly it should have been more closely placed to either the verb or the noun to display with precision the intention of the writer in that behalf, but unfortunately he has chosen to convert into a clause, introduced by a relative, as a co-ordinate and somewhat independent affirmation rather than as a modifier in the shape of either phrase or clause, adverbial or adjective; which arrangement intensifies that obscurity of meaning, giving rise to this lawsuit. If he had modified the verb by placing the words adverbially near it, the meaning would be quite plain in favor of the contention of the bank in this case, though it would still not be entirely free of doubt whether the bank was to be exempt or only the stockholder or both, as any one may see, who will so reconstruct the sentence. So if he had modified the noun or subject "annual tax" by placing the phrase adjectively in immediate contact therewith the arrangement would have been somewhat more favorable to the State than now it is but scarcely less doubtful than by the present arrangement. Perspicuity required that there should have been an entirely new sentence or independent clause, at least, with more amplitude of expression to convey either of the meanings now contended for by these parties. The construction adopted forces us to determine whether the relative "which"—relative in form—is really intended to be a relative or something else, and if used as a relative, whether it bears only the simple subject "annual tax," or teems with the complex subject "said institution shall pay to the State an annual tax." I have already indicated my preference for this latter construction, simply because the act is dealing with the rights, duties, conduct, privileges and immunities of the "said institution" primarily, and not with a tax upon the citizen or his property, individually.

The word "which" gives writers a great deal of trouble, and its

usage is varying, as the consultation of any standard work on grammar will show. It is often equivalent to "and it," or "that," used restrictively. If either of these be substituted for it here the sentence reads more favorably for the contention of the State in this case, though it does not settle the doubt by any means. But this usage is said to be not generally observed by modern writers in this century, and the rule is given that "which" is to be used in preference to "that" or "and it" whenever its clause introduces a new fact about the antecedent; "that" is to be preferred when the clause is dependent and limits or defines the antecedent. (Maxwell's Adv. Gram., Section 266; *id.* Section 282.) The use of the word in this sentence seems to accord with this rule, and the clause is independently introducing a new fact about the antecedent, and not limiting or defining it. But what is an antecedent? "The antecedent may be a noun, a pronoun, a phrase or a clause." (Max. Ad. Gram., Section 280; *id.* 570-572. See also Reid's Higher Eng., pp. 109, 111, 113, 121, 122.) It seems to me that to supply the simple word "tax" as the only antecedent here and to read "which *tax* shall be in lieu of all other taxes" is to adopt the restrictive and limited use of the equivalent "and it" or "that" and not to regard the obvious introduction of a new fact about the antecedent which this clause is clearly intended to accomplish. But if we take the whole preceding clause, viz: "Said institution shall pay to the State an annual tax of one half of 1 per cent. on each share of capital stock," as our antecedent about which the new idea is now introduced by this clause—itself introduced by the relative "which"—and the meaning becomes quite clear that this annual tax, whatever its character or nature, and upon whatever it may be levied, whether on property of the bank itself or somebody else's property, is a payment to the State by the bank—and, by the way, the security and certainty of this payment by the bank in a lump sum rather than collecting the same in driblets of more or less widely scattered stockholders

is not to be overlooked as a part of the consideration given for this exemption—"which" shall be in lieu of all other payments by it of any taxes other than this, whether this be a tax upon its own, its stockholders, or any one else's property. It is a universal exemption for each recurring year from all other tax burdens than this, and this construction accords with the design or scheme to create an institution which shall be attractive to investors. If this were not the intention, if this were not the design or scheme, this provision, limited as the State would now limit it after so many years of acquiescence, has no appropriate place in the charter of a bank, but belongs more properly to a revenue law, and may quite as well have been left out, for it is almost demonstrable that the bare exemption from a higher rate of taxation upon the chose in action of the shareholder, directly levied upon him individually *qua* shareholder, and yet subject to a larger tax upon him, by the indirect process of a tax upon the bank or its property, belonging to him, *qua* shareholder, would be a mere shadow of the substance he desired and fairly might think he was obtaining. Indeed, it operates as a burden upon him over and above the ordinary shareholder not having this exemption or may so operate, confessedly, under certain conditions. I cannot upon this analysis of the language of the charter apart from the adjudications, think that the Legislature intended by those words anything less than a complete and universal exemption of both the bank and the shareholder from any than the charter tax, however improvident it may have been.

HISTORICAL CONSIDERATIONS.

Historically, this construction is supported by the surrounding circumstances at the date of this charter, in 1856. I have taken some pains to examine the legislation of this State and North Carolina so far as I could find it both in the grants of charters and the taxation of corporations by general revenue laws, and I find that this form of taxing corporations by a levy of 25 cents, or in one

case not more than 50 cents, upon each share of stock, or by the levy of a fixed per centum upon each share, was the method in general use. There is not the least doubt that the Legislature and the people understood this to be, practically, however it might be in strict technical analysis of the nature of corporate property and its classifications, as well understood then as now among lawyers, a tax upon the corporate property or a tax upon the corporation, to speak more broadly. The Supreme Court of the State had so decided as early as 1836, and it does not matter in the mere history of the subject that the Supreme Court of the United States 40 years later, and 20 years after the date of this charter, did not think this understanding correct, and ruled that it was a tax on the chose in action of the shareholder, which in the nicest technical classification is in no sense corporate property at all. The Supreme Court of Tennessee understood that a share of stock was not corporate property, and in 1836 called attention to it; and yet it was well known, historically, that such was the Tennessee method of taxing corporations. This charter must be read by the light of that fact in resolving any doubts about a limitation upon the exemption. It was not considered by the legal tribunals of the State or by the Legislature that this charter tax was a tax upon the shareholder's chose in action, and if it be technically so, this charter, historically considered, was not constructed or acted upon by any one until now, in view of that fact or of any technical niceties arising out of it; and it seems to me plain enough to be unfair in construing the exemption to limit it by a resort to those niceties of classification as against the general understanding of the time of the grant, however unfair, also, it may have been to exempt the shareholder by a resort to such niceties to include him against that general understanding also. The courts do not arrive at the intention of the parties to a contract or reverse that intention by such exactness of classification, or rather by changes of opinion concerning it.

As I have said before, it is my judgment that too much stress has been laid upon this arbitrary and by no means uniform and altogether artificial subdivision of corporate property into subjects of taxation. Taxing laws and fiscal systems may be wisely adapted to these classifications, and there they may be highly useful, but in constructing the franchises of a charter they have no such dominant place as the argument here, and the theory of this claim for further taxation assigns to them, and must assign to them in order to escape the plain significance of this grant of exemption from taxation. It is not more competent to impair the obligation of the contract by assigning to the Legislature a notion about the technical classification of the specific thing taxed, which it is plain from surrounding circumstances the Legislature did not regard as material to the work in hand if they were aware of the technicality, as no doubt they were, it may be assumed, than to otherwise unreasonably assign meanings to words which were not intended to be used in that meaning. In other words, I do not believe that the Legislature intended to limit this exemption from taxation by any notion that it had or might have had concerning the precise technical character of the property upon which it levied the tax, as being corporate property or individual property. Whichever it was it had the right to tax it, and in consideration of that tax and other considerations to make the exemption as broad as it chose. The whole subject was open to it, and there is not the least indication in the Act itself or the environment at its creation that this technical classification was deemed to be of the vast importance now attached to it. Here I will note that even a slight examination of the revenue laws of this and other States, of text writers and of cases, shows that there is no such fixity of subdivision and classification of corporate property any more than other property as would enable a court to affirm that this Act was constructed in relation thereto, or as would justify a resort to any classification that might be imagined as a conclusive evidence of intention in respect of this exemp-

tion. Exemption from taxation generally is pertinent to the owner and not to the thing, and we look rather to the person to be benefited than to the thing affected by it, while when we turn to the tax, the thing becomes paramount rather than its owner. Hence the propriety which I have insisted upon of looking at the Act as a charter and not as a taxing Act or a revenue law carefully affixing the burdens to each article of property, and, if so considered, this classification of subjects of taxation becomes of far less importance in the charter than it would be in the other. Besides, shares of stock, although only individual choses in action of the owner and not corporate property, are often for obvious reasons of association of ideas confused with corporate property. Our Legislature has, confessedly, so confused it, and our State judicial decisions have treated this as a tax on corporate property, and this is a practical application breaking down the distinction to that extent at least.

In Farrington vs. Tennessee, 95 U. S., p. 679, Mr. Justice Swayne enumerates as subdivisions, the franchise, the accumulated earnings, profits and dividends, and real estate, but they are only "some of the objects in this connection liable to taxation;" and the division used by the United States legislation referred to by him is quite different, thus: Deposits, capital employed in their business, circulation and notes of State banks used as money. And it is noticeable that while enforcing the technical distinction between a tax on shares of capital stock and a tax on capital stock itself as subjects of taxation in order to extend the exemption of the charter to the protection of the shareholders individually, he says, also, that "each share represents an aliquot part of the capital stock," thus indicating the same confusion by association that the Tennessee authorities proceeded upon. The truth is, that "a share of stock" is a bare chose in action in its relation to the shareholder, as property; but in its relation to the property of the corporation is a mere structural subdivision of all

the property used as a convenient standard of measurement for parceling it out, very much as a bushel is used to describe quantities or to parcel out the wheat in a bin; and the term "shares of capital stock" may be used appropriately in either of these senses, descriptively. Until there has been a dividend of profits set aside, to each shareholder his share, or a winding up and a residuum divided, and set aside to each shareholder his share, this chose in action or "share of stock" is very much like an empty bushel of "dry measure" which the owner of the wheat holds in hand ready to measure up and carry away his "share" when the division, either partial or complete, shall be made. This right of taking away, which is the only property interest of the individual, may be made a separate subject of taxation, it is true; but so may the owner's horses, or mules, or cattle, swine and sheep, and all very arbitrarily, double taxation being easily avoided and not necessarily an incident of any given subdivision of either the corporate or the other property for the purposes of taxation. But does this fact necessarily imply against words of universal signification that the exemption they grant shall be limited to the particular subject taxed? It does not seem to me a necessary implication, however useful and desirable it may be, or however well it may serve the State in escaping from its grant. If a farmer could contract with the State to take a fixed per centum upon the fixed value of his "horned cattle" every year as long as he should live "in lieu of all other taxes," and the business in which he was engaged were such that, presumably, a release from all taxation upon his farm and his farming operations was the benefit he and the State contemplated by the very making of the contract, could it be said that the fact that "horned cattle" was naturally or otherwise a separate subject of taxation would at all imply that the exemption should be confined to the further taxation of "horned cattle?" No matter how strictly the presumption against the surrender of the taxing power should be held, this im-

plication would not be more reasonable because of that strictness.

Chief Justice Waite, in Tennessee vs. Whitworth, 117 U. S., pp. 129, 136, makes a largely different enumeration of the elements of taxable value "sometimes found in corporations." He divides these elements thus: "1, franchises; 2, capital stock in the hands of the corporation; 3, corporate property, and 4, shares of the capital stock in the hands of individual stockholders." In Texas bankers were required to list for taxation money on hand, in transit, and in the hands of others subject to draft, except legal-tender notes, and their bills receivable and other credits. If any one of these had been taxed in a charter "in lieu of all other taxes," I do not think the mere fact that money could be so divided or that money and bills receivable were each a separate subject of taxation would have necessarily limited the force of the words of exemption. (Griffin & Heard, 14 S. W. R., p. 892.) Nor if "deposits" in the savings banks, belonging in fact to other people, were taxed by their charters, as they were in the tax laws of Massachusetts, one-half of 1 per cent., and the charters had made a contract that this should be in lieu of all other taxes, as practically the non-taxation of anything else concerning the banks, except deposits, by the tax laws, did, temporarily at least, exempt everything else, could it be claimed that the exemption of the charter would be necessarily limited to further taxation on deposits, because, forsooth, "deposits" were a separate subject of taxation not even belonging to the bank, and less to its shareholders, or were, to use the language of Chief Justice Waite, found as an element of taxable value in corporations? (Bank of Redemption vs. Boston, 125 U. S., pp. 60, 67.) I have noted other examples of these elements of taxable value found in corporations, and it is, I think, an assumption not justified by the facts to affirm that there is anything like such a fixity of this divisibility of the subjects of taxation, either in the theory or practice of taxation, as the argu-

ment here presupposes. I may add in the language of another, that "we agree with counsel for the town, that statutes exempting property from taxation should be construed with reasonable strictness; but they should not be so strictly construed as to defeat the obvious intention of the Legislature." (New Haven vs. Sheffield Scientific School, 59 Conn., pp., 163, 166.)

I have given so much attention to the subject of this elemental divisibility of the subjects of taxation in its relation to corporations because I believe that upon it is based the fundamental fallacy of this attempt by the State to so construct a taxing act that it may evade the force of this exemption. It is predicated of a misconstruction of what has been said by the Supreme Court of the United States upon that subject, or rather upon a misapplication of it, unless the courts are to resort to these distinctions for the purpose of mitigating the decisions which have permitted the States to make bargain and sale of their taxing power without the possibility of any restoration of it, except in this mode of unreasonable strictness of refinements in the interpretations of statutory contracts.

Another view of the force of events connected with our legislative history upon the subject of the taxation of corporations, relates to the practical construction of these Acts by the Legislature itself. Until this most recent taxing legislation involved in this suit, the revenue laws practically extended the exemption with the fullest scope to all corporations, whether they had this charter exemption or not. I do not mean to say that the rate of taxation was always as favorable as is found in the charters. Counsel say that when this charter rate was first established it was largely in excess of the prevailing rate on other property, and has become to be less only because of the enormous increase of the rate of taxation. Possibly, they say, it may at some time again become less. However this may be, it is certain that for a very long time the Legislature taxed only "each share of capital stock," supposing,

as we have seen, that this was a tax on the corporation and not the shareholders, which error the Supreme Court of the United States has corrected; but the corporations were not otherwise taxed, nor were the shareholders for a long time, which was a practical construction of the meaning of these exemption charters, and justly other corporations not so favored were put on the same footing, not always precisely as to rate, sometimes less, sometimes more, but always as to the manner of taxation. It must be conceded to the State, as counsel argue, that it cannot be bound to any permanency of methods in taxation, and may at will change its policy and methods, and nothing should be implied against this power. Neither do we imply anything against it. But, like all other parties to a contract, the State, when the question of its intention in the use of words arises, may be held to have intended by those words that which, by its own acts, has been placed upon them as a practical construction of their meaning. There is no injustice in this, nor yet any limitation upon its power to change its Acts and reverse, if it chooses, its operations in that regard. Nevertheless, Legislatures, like other men, interpret their words by their actions, and to this extent may those actions be examined, without the least restriction upon the power to change them at will. Both the individual interest or property of the shareholders and the property interest of the corporation, in its aggregate capacity, were exempt by this mode of taxation in the practical operations of government at the time these charters were granted, and for a very long time afterward, until this struggle to get in another tax, on one or the other. commenced, because, technically, it was not double taxation, to tax both, however burdensome it might be; and because, technically, it is a rule to favor the reservation of the taxing power, rather than its grant, in the interpretation of all charters. But, just as technically, it is the duty of the Court to follow the meaning of the words and hold the parties to the fair and reasonable intention they have manifested, most of all to each other, by those words.

ADJUDICATION CONSIDERED.

Each side claims, with great earnestness and force of argument, that this question between them has been settled by the adjudications. The bank claims, at least in one of the several cases we are trying, that the decisions have technically all the force of the principle of *res judicata*, and the adjudications have been relied on, the facts being apparent from the bill, to that extent. All that has been said heretofore would have been uselessly, if not impertinently, said if I were of that opinion. Not one of the decisions has in my judgment, stripped to its bare technical proportions as an adjudication, decided this question. Counsel for the State very properly says that the bank cannot rely first on the overruled decisions of the Supreme Court of the State that this was a tax upon the corporate property and only an exemption of the corporation itself and never an exemption of the shareholder, to protect it against further taxation of the corporation; and secondly, upon the decision of the Supreme Court of the United States, overruling the others, that this is a charter tax upon the shareholder, and not a tax upon the corporation, and an exemption, therefore, of the shareholder also; and, thus tack the two sets of cases together as a common adjudication that both corporation and shareholder are exempt. The Bank could do this if the Supreme Court of the United States had ever decided that a tax upon the shareholder and an exemption of his individual property in the shares held by him from any further tax upon those shares as to him extended the benefit of the exemption to the corporate property and to the corporation in its corporate capacity. The Supreme Court of the United States has never decided this, and for the very plain reason that such a question was never before it, and, under the conditions of the cases, could not have been. It could have had no jurisdiction of such a question through the avenue of a writ of error from the Supreme Court of the State, because that Court had never decided *against* any claim of the corporation from

further taxation upon its capital shares, but always in favor of that claim.

Counsel for the Bank concedes very frankly that since the Supreme Court of the United States decided the charter tax to be upon the shareholder and not the corporation, the Supreme Court of the State has continued to recognize the exemption as extending to the corporation and its property, notwithstanding that decision, but he argues that this is in violation of its own rule of judgment that the tax and the exemption go hand in hand, and the latter is no broader than the former—which, undoubtedly, was the rule of the Supreme Court of the State until the decision of the Supreme Court of the United States above referred to as overruling the others. And, furthermore, he argues that it is in violation of the authority of the Supreme Court of the United States to so disregard its decision.

I do not care to deal with this conflict of authority, if it be such, nor its perplexities, for it is not necessary. But I may say that the Supreme Court of the United States has never sanctioned the position, as to these charters we have here, that the tax and the exemption go hand in hand, and that one is not broader than the other. My view is that whether this be a tax upon the corporation only or the shareholder only, the exemption is broader than the thing taxed and covers both the corporation and the shareholder. I take it we must all accept the view of the Supreme Court of the United States that this is a tax upon the shareholder only. (Farrington vs. Tennessee, 95 U. S., p. 679.) But *non constat* that the exemption, the stipulation of the charter that this tax upon the shareholder only, shall be in lieu of all other taxes, does not extend to the corporation and its property as well as to the shareholder. I have written this opinion to justify my own judgment that it does. The Supreme Court says it covers any further tax against the shareholder. It does not say

that it excludes from the exemption the corporation and its property, nor does it say that it includes it. Until it does say one or the other, we must be contented to get along without its paramount authority. If it should follow the example of the Supreme Court of the State, which held that this being a tax upon the corporate property only, the exemption does not include a tax on the shareholder's property, it will undoubtedly overrule this judgment and decision we are now making if it adheres to its own ruling already made that it is a tax on the shareholder only. If, however, it follows the later example of the Supreme Court of the State and interprets the Farrington case, *supra*, as that Court interprets it, to cover also in the exemption the corporation and its property, it will affirm the judgment we make and for the reason that we give, namely, that although the tax is on one, the words of the exemption cover both. So, although I do not think with the Supreme Court of Tennessee that the Supreme Court of the United States has already decided the exemption to cover both, I do think it does cover both and that the Court of last resort will so determine. I need not, therefore, further consider the cases in relation to the plea (or demurrer equivalent to such a plea) of *res judicata*. I should say, however, that in strict technical consideration the Supreme Court of the State has only inferentially decided that the exemption extends to both the capital stock of the corporation and the shares of the shareholders, the tax assessed and rejected by its decisions being a tax under a general law assessing the real property of all persons, which was assumed by the assessor to extend to the property of the bank, notwithstanding the exemption; and the point was not presented as it now is by a specific tax by the Legislature upon the capital stock as the property of the corporation. Inasmuch as the real estate assessed by the assessor under the general law could only be exempt under the charter and because there is no distinction, possibly, between real estate in which the capital stock is in-

vested and the capital stock itself, the decision is in favor of the exemption of the capital stock, inferentially, but not directly. (Bank of Commerce vs. McGowan, 6 Lea, p. 703; the State vs. Butler, 13 Lea, pp. 400, 406; the State vs. Butler, 15 Lea, p. 104; State vs. Butler, 86 Tennessee, p. 614.)

The foregoing are the cases of the State Supreme Court since the Farrington case in the Supreme Court of the United States which was decided there in 1877 and in the Supreme Court of the State in 1876. (Memphis vs. Farrington, 8 Bax., p. 539; Farrington vs. Tennessee, p. 95 U. S., 679.) The first was an assessment of this very defendant bank upon its real estate under the general law, and it was held that the decision of the Supreme Court of the United States had extended the exemption of the charter to shareholders, contrary to the opinion of that Court and "therefore," the exemption would "protect the capital stock and the shares of the stockholders from any taxation beyond that prescribed in the charter." May not this be a *nonsequiter?* The next case involved the Union and Planters Bank, having a like exemption, and the same view was taken of assessments under the general law of its real estate and of the effect of the Farrington decision by the Supreme Court of the United States, but, as before remarked, whatever may be inferred as to the ruling it may make on the questions we have here or the potency of these decisions, they did not involve the levy by the Legislature of a specific tax upon the capital stock, such as has been made under recent legislation, and I am uncertain whether to take them as conclusive adjudications that stock and shareholder are both exempt, although I think they are both so exempt.

The other cases were a direct attack by bill, upon the organization of the banks and a denial of their right to any exemption because of want of title to their corporate fran-

chise, and did not involve this question. On the whole, I think these cases support the ruling we are making, though I do think with counsel for the State that they give too much force to the ruling of the Supreme Court of the United States as an adjudication of the question, and hence I have examined it in that view. The cases prior to the Farrington case treat the charter tax and the exemption as limited to the corporate property and as excluding the shareholder and his property. Their importance here rests in the fact that they hold that being a tax only on the corporate property the exemption does not extend further than the tax—that is, does not exempt anything except the property taxed by the charter from further taxation. If that was then true as to coporate property it is true now as to the stockholder's property, and the Supreme Court of the United States having ruled the charter tax to be a tax on the shareholder's property, under the same rule established then by those cases, and never overruled by either Supreme Court, I think the corporate property would not be now exempt. And herein lies the force of the State's case now, but for the reason stated, I do not assent to this narrow view of the exemption, and not being guided by any authoritative adjudication to that effect, feel at liberty to enforce my own view as to the law of this case, particularly since these cases have been reversed on the main point as to the nature of the tax, whether they have been effected as to the other point concerning the restriction of the exemption because of the specific tax, or not. (Union Bank vs. State, 9 Young, p. 489; DeSoto Bank vs. Memphis, 6 Bax., p. 415; Memphis vs. Hernando Insurance Company, *id.* 527; Memphis vs. Farrington, 8 Bax., p. 440.)

The decisions of the Supreme Court of the United States before the Farrington case have been sufficiently noticed by that case itself and the decisions of the Supreme Court of Tennessee and do not require any notice at my hands. I have already stated that, in

my view, that case only decides that this charter tax is a tax upon the property of the stockholder and not upon the corporate property, and that the exemption protects at least the property of the stockholder, but whether it protects also the property of the corporation has not been decided. The cases since that time are quite numerous and all are instructive upon the general subject, but none of them is decisive of this case. The case of New Orleans vs. Houston, 119 U. S., 265, it seems to me, quite nearly decides that a tax like this is a tax on the capital stock and not on the shares of the stockholders, but there the taxing Act was thus arranged to defeat the exemption given to the corporation in consideration of the payment of a gross sum. If the language of that Act so clearly indicating a tax on the shareholder was in fact a tax on the corporation, this might be so held also, as it was in the Tennessee Courts, but the Farrington case is directly conclusive of this view and we are not at liberty to follow the later case even if it could be so taken. If the Supreme Court itself will not acknowledge any overruling of a former case of its own, we hesitate to hold it overruled by implication.

CONCLUSION.

In conclusion, I repeat that the language of this charter levying "an annual tax of one-half of 1 per cent. on each share of capital stock" is so ambiguous that it may descriptively designate a tax on either the corporate property in the capital stock or the individual property in the shares,and that the Supreme Court of the State and the United States have disagreed on this point; but, in my judgment, whether it be one or the other, the exemption which is given by the words "which shall be in lieu of all other taxes," is a protection of both the corporate property and the individual property in the capital stock and its shares, but that neither court has decided this point explicitly since the Supreme Court of the United

States determined it to be a tax on the individual property of the shareholder; although the Supreme Court of the State has recognized this full scope of the exemption since that time.

THE PRIVILEGE TAX.

The same ruling we have just now made applies to the privilege tax as well as to that upon the capital stock and for the same reason.

INCREASED CAPITAL TAX.

The bank has largely increased by authority of law its capital stock since the original charter, and there is another contention that since the Constitution of 1870 forbids these special privileges the exemption must be limited to the amount of the old stock and cannot include the new. It is manifest in the view we have taken that unless the charter restricts the power to increase either by fixing it definitely or by words that forbid any further additions to the capital stock the charter itself would confer the right of increase. This charter has no limitation as to that right and the privilege is undeniable, perhaps, under the charter. But the words of the exemption are broad and what we have said of its universality includes any authorized increase of capital stock as well as the rest. The charter has not a word to indicate any such restriction of the exemption nor anything from which it may be implied, and it seems to me that the Constitution cannot affect its force any more than the statute could. If the Constitution had expressly ordained that the exemption of the bank should be limited to the amount of the original subscription or to that which existed when the Constitution was passed, unless the charter itself had contained some restriction of the amount of capital stock authorized, it would have been invalid as impairing the obligation of the contract if the right of increase be a charter privilege, as we hold it to be.

Demurrer sustained and bill dismissed.

So ordered.

HEARD AS SPECIAL CHANCELLOR.

In the Chancery Court of Shelby County—R. D. 8085, State of Tennessee vs. Memphis City Bank et al.; R. D. 8086, State of Tennessee vs. Hernando Insurance Company; R. D. 8087, State of Tennessee vs. Union and Planters Bank et al.; R. D. 8088, State of Tennessee vs. Home Insurance Company; R. D. 8089, State of Tennessee vs. Phœnix Fire and Marine Insurance Company; State of Tennessee vs. Bluff City Insurance Company.

Hammond, Special Chancellor.

The foregoing cases were heard before me as Special Chancellor designated, because the Chancellor has been of counsel, and therefore disqualified. The opinion just read in the case of the State of Tennessee vs. Bank of Commerce, removed from this Court to the Circuit Court of the United States for the Western District of Tennessee, and there heard and determined by me as one of the Judges of that Court, disposes of these cases as that was disposed of—by sustaining the demurrers respectively, and dismissing the Bills, which is ordered accordingly in this Court also.

But there are some special features, which should be noticed by me as the Special Chancellor, which will now be adverted to in support of this judgment.

STATE AND FEDERAL COURTS.

It was argued at the Bar that whatever view the Federal Court might take of its power to decide adversely to the Supreme Court of this State, its own Courts could not do that. It is a sufficient answer to this to say that the ruling we have made is not adverse to that of the State Supreme Court, but in accordance therewith in results, although upon a somewhat different view of the scope of the exemption clause from that taken by the earlier cases, but not at all beyond that taken by the later cases, though I give a differ-

ent reason for the ruling, which is immaterial so far as the result is concerned. It is not, therefore, necessary at all to consider the suggestion of the argument that even a State court of inferior jurisdiction must follow the Supreme Court of the United States rather than the Supreme Court of the State on a question like this where they are in conflict, because that court speaks authoritatively on such questions to all courts, State and Federal alike.

UNION AND PLANTERS BANK.

There are some other grounds of demurrer, especially taken in these cases, but not in that of the Bank of Commerce, which relate to the validity of the revenue laws under the State Constitution, enforcing equality and uniformity of taxation, and the further ground is taken in the case of the Union and Planters Bank that the tax levied in former years has been repealed by changes in the law and a general repealing clause. As to the repeal, I do not think the ground well taken, but I will not embarrass the record or the parties by a special ruling, which might make cross appeals necessary, and waiving my own judgment will, *pro forma*, adopt that of counsel and sustain that ground of demurrer also.

I shall also take the same course and somewhat for the same reason as to the demurrer upon the ground that the tax is not equal and uniform. But I think this a far more formidable ground of objection to this tax, under the State Constitution, than the one concerning the alleged repeal of the act of 1887. It goes upon the theory that this taxing Act does not levy the same or an equal tax upon *all* corporation shares of stock, that is to say, not certainly equal because alike in method and taxable value, although it may turn out or may not, as equal in burden or rate. The act singles out certain corporations for taxation in a peculiar way very much as if citizens A, B and C had been selected from the body of the population and taxed in a different mode from the rest, which might or might not produce equality of results. It is said that the

classification is general and includes all corporations coming within the description of the class and that the limitation is not in the law, but in the natural limitations upon the class so confined only because all further additions to it are impossible, no matter how, but in this case because of the prohibition by the Constitution of 1870 of any more charter exemptions or special privileges. There is great force in this, and perhaps it is conclusive. But as before, I shall sustain the demurrer *pro forma* and let it go along with the other to the Supreme Court.

The Union & Planters Bank also sets up a demurrer upon the ground that the Farrington case in the Supreme Court of the United States, so much discussed in argument and in the opinion just read by me in the Bank of Commerce case, and which was a case against a stockholder of that bank, is *res judicata*, as shown by the Bill. I do not agree to this, as will be seen by that opinion. Yet it will do no harm, as before, to sustain the demurrer *pro forma*, and let it go to appeal like the rest. The main question of the scope of the exemption makes all this, in my judgment, immaterial. So, as to the demurrer of that bank against the discovery prayed against its cashier, who is made a Defendant. Let it be *pro forma* sustained.

BLUFF CITY INSURANCE COMPANY.

One ground of demurrer in the case of the Bluff City Insurance Company is that set up to the attack made upon its organization; that having been heretofore in another case called into this Court to answer a claim for taxes where its right to exemption was challenged and the claim to tax it further was denied, there was then and there an opportunity to make this attack upon its title to its franchises, which was not done. Wherefore it is urged as a ground of demurrer, that the point is *res judicata* upon the theory that all that might have been litigated is always concluded. I do not think this applicable because it does not follow that the

State may never challenge the legality of a corporate body simply for the reason that heretofore it has not chosen to do so in other suits not necessarily involving the organization. But also, it is a mistake, in my judgment, for reasons presently to be given to suppose that in a suit to collect taxes against a corporation as such, its legal existence as a corporation may be at the same time challenged. The two things are not consistent.

If the suit to collect taxes were against the citizens composing the illegal and falsely organized corporation—a body without existence—and the property were taxed as their property as individuals, they might then be compelled to show a legal corporate existence to escape the taxation and be allowed the charter exemption. But the State cannot tax them as a corporation, and deny its corporate existence under its charter. It cannot repudiate the exemption and allow all the rest to stand. It must either dissolve the corporation or ignore it entirely, and tax the effects as the property of the citizens, perhaps. Certainly it cannot, in my judgment, tax shares at their value and then rely for the validity of the tax upon the theory that there are no shares, that there is no corporation. The levying of a tax itself seems to mean estoppel *in pais* upon this course and precludes a denial of corporate existence, in any suit to collect the tax as a tax upon the corporation or the shareholders as such, in every essential requisite of that doctrine.

Besides, the allegations of the Bill are too vague and indefinite to show any illegality, or to call for any discovery by the secretary, made a defendant. The Bill does not come up to the technical requirements of a bill for discovery. Hence I have no difficulty, for both these reasons in sustaining the demurrer to the attack upon the organization, though not because it is already *res judicata*. The great battle was made over the question of exemption and not much attention paid to these other defenses, and I dispose of them as they were argued, mostly *pro forma*.

MEMPHIS CITY BANK.

The same ruling must be made in the Memphis City Bank case, though the question there is somewhat different. The exemption in that charter is in these words: "That there shall be levied a State tax of one-half of 1 per cent. upon the amount of capital stock actually paid in, to be collected in the same way and at the same time as other taxes are by law collected, which shall be in lieu of all other taxes and assessments, provided the said corporation shall file with the Comptroller of the State, semi-annually, in the months of July and January in each year, a synoptical statement of the business operations of the company, and the capital stock subscribed and paid under the oath of the cashier."

The Bill, as amended, agrees that this synoptical statement has been filed. This being done, I think that whatever may be said of the other charters, this is very clearly not a tax on the shareholder's property in the shares, but directly on the capital stock and the corporation, and certainly under the State's own view no further tax can be levied on that. For reasons already given in the Bank of Commerce case, just decided, I think the other branch of the revenue law which levies the new tax on the shareholder's individual property values, in such cases, is also invalid. The tax is on the capital stock, but the exemption covers both the capital stock and the shares and all interests of the stockholders in either the one or the other.

This bank by its charter, granted January 24, 1870, just before the new Constitution of that year, was called the "Memphis City Fire and General Insurance Company," and for some time was engaged in the business of an insurance company exclusively. But it had power of holding all kinds of property, real and personal, and conveying the same, "and of receiving in trust from any person money, jewels, plate or other valuable things, etc.," and to

lend the surplus funds on any public stocks, etc., or to invest them in any real or personal estate or choses in action or other good securities. After the new Constitution forbidding special privileges by a general law of March, 26, 1887, Acts 1887, page 323, any company having the right to receive moneys in trust, etc., should have the power to receive deposits, and lend the same and its capital on any kind of commercial or business paper, etc. By a subsequent act the name was changed to the "Memphis City Bank." (Acts 1889, p. 9.) Both these acts provided there should be no abridgement of their former rights, powers, privileges or immunities of the charter.

It is now contended that this is in effect creating a bank, after the constitutional prohibition, by converting an insurance company without banking powers into a bank, and that to thus transmit and secure an exemption from taxation is unconstitutional under the circumstances. One reply is that the original charter gave banking powers or some of them, and that this is only an enlargement of powers already granted, and cases are cited that this may be done. Apart from this, and I do not deem it necessary to decide that point, I think the State cannot thus make the question. I have already remarked upon this estoppel in the Bluff City Insurance Company case, where the organization is attacked to be rid of the exemption, and I think here as there that the State must by *quo warranto* or otherwise attack not only the exemption, but the whole corporate existence by dissolving the corporation and returning the property where it belongs, that is to say, to the ownership of the joint wrong-doers in this regard, to reach it for taxation; or else to ignore the corporation and tax the effects as their individual property or belongings, and thus force them to set up the void charter for protection. It cannot tax the capital stock or other property as of a corporation or the shareholders an of their corporate shares, and thus admitting the validity of the

charter for taxing purposes deny it as to the tax exemption. If it admits the chartered existence for one purpose it must for all. If the charter is good enough to support this new tax upon its capital stock or its shares of the shareholders, it is good enough to support the exemption as well.

Moreover, if this be not a bank, it is an insurance company, and it may claim the exemption as such, and the fact that it is misusing its capital and funds cannot be *punished* by further taxation and a denial of the benefits of the exemption. Neither the general law nor any statute authorizes such a penalty for the misapplication, and the remedy is by the proper proceeding to forfeit the charter or compel a return to its appropriate business. This all seems to me very plain, indeed, and I need not, therefore, inquire if this be properly a banking institution. But I think it was more than an insurance company, and had some of the functions of a bank originally, and that there was enough of these granted to support the enlargement without a violation of the Constitution. (State vs. Butler, 15 Lea, p. 104; State vs. Butler, 86 Tenn., p. 614; Railroad vs. Gaines, 97 U. S., pp. 697-709; Mercantile Bank vs. New York, 121 U. S., pp. 136–156; Cooly Tax, p. 212, note.) But whether this be true or not, as long as the State taxes it as a corporation and files this Bill to demand the tax, it seems to me a clear estoppel against any denial of the charter. Just as one who deals with a corporation as such cannot deny the corporate existence when suing or being sued about those dealings. The State can no more blow hot and cold with the same breath than other people, not even to breathe life into its dead power of taxation. The demurrer in this case will be, therefore, also sustained.

THE PHŒNIX FIRE AND MARINE INSURANCE COMPANY.

The only doubt now remaining about these cases is that concerning the Defendant, the Phœnix Fire and Marine Insurance

Company, which has filed an answer and a plea along with its demurrer. The Defendant was originally the Washington Fire and Marine Insurance Company, its name having been changed by Act of the Legislature in 1881. Its charter gave it all "the rights and privileges" of the DeSoto Trust Company, which had been given all the "rights, privileges and immuinties" of the Bluff City Insurance Company, which had this exemption we have been considering, as we have seen in the case of that company, hereinbefore considered. The word "immunities" was left out, no doubt, if we could know the fact, by clerical error or careless proof-reading, for it has been the legislative habit to so create corporations in a short form, so to speak. Under the decisions of the Supreme Court of the United States, I very much doubt if this Company can claim the exemption, since we go in such cases by the words of the charter and cannot cure the omission by any parol or other proof, except a corrected charter, if the omission be by transcribing erroneously from the official copy of the charter, as to which we do not know. The Supreme Court of the United States has held with some strictness to the rule against transmitting the exemption from taxation by any implication upon doubtful words. (Central Banking Company vs. Georgia, 92 U. S., p. 665; Railroad Company vs. Gaines, 97 U. S., pp. 697–711; Morgan vs. Louisiana, 93 U. S., p. 217; Humphrey vs. Pegins, 16 Wall., p. 244; Tennessee vs. Whitworth, 117 U. S., pp. 139–146; Pickard vs. E. T., V. & G. R. R., 160 U. S., p. 637.) Notwithstanding this strictness, and that "franchises" and "privileges" have been held not to include immunity from taxation, it is said in the last of these cases that other provisions may remove the doubt and include the immunity in the term "privileges," and in the Whitworth case, *supra*, as I understand it, Wilson vs. Gaines, 9 Bax., p. 446, was dissented from, and it was held that "powers and privileges" include the immunity from taxation, since "exemption from taxation is a privilege in the popular

sense of the term." (Tennessee vs. Whitworth, 117 U. S., pp. 139–147.)

I may add that popularly an exemption from taxation would be considered "a right," although it may not be "a franchise" or "a power" in a strict sense. Considering the legislative habit of conferring all these corporate rights, powers, privileges, franchises and immunities in brief form in very many of our charters, and that this exemption from taxation is popularly considered the most valuable of them all, I am disposed, on the anthority of the Whitworth case, which dissented from some of the Tennessee cases in express terms, as I have shown, to construe "rights and privileges" as carrying the tax exemption. I do this as much because it is wise not to detain this case from an appeal, so that all of them may go to an ultimate tribunal together as together they have been heard and submitted here, as I do from the conviction that if I had the final decision I should make the same ruling, upon a strong implication that the charter shows on its face that the omission was casual, since it copies from another charter which had three words instead of two and that charter was intended to carry the exemption. There was no reason for dropping the word "immunity," as shown by the act itself, and it seems on the face to have been a probable error in transcribing. So the demurrer here will be also sustained.

The result is that the demurrers in each case are sustained and the Bills dismissed at the plaintiff's costs.

NOTE—The cases against the Planters Fire and Marine Insurance Company, the German Bank, the Mercantile Bank and the Mechanics Savings Institution were not heard although the records have been handed to me. My understanding is that they have been removed to the United States Circuit Court and are not ready for hearing and I have given them no attention at this time.